(19,137.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 486.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester, plaintiff and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-eighth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirty-first day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—
MARCUS P. KNOWLTON.
C. J. S. J. C.

1—486

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

And now, here, the judges of the supreme judicial court make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said supreme judicial court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[SEAL.] T. S. JOHNSON, *Clerk.*

3 *Bond.*

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sittting of the supreme judicial court of Massachusetts, holden at Worcester within and for the county of Worcester, in a suit depending in said court, between The City
4 of Worcester, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus a judgment and final order was rendered against the said plaintiff dismissing its said petition and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
By JOHN R. THAYER, *Vice Pres't.*

Attest:
[L. S.] ANDREW B. McGOWN, *Ass't Sec'y.*

Approved:
MARCUS P. KNOWLTON,
C. J. S. J. C.

Bond approved
FRANCIS H. DEWEY,
Att'y for Wor. Con. St. R'lway Co.

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Marcus P. Knowlton, chief justice, and filed November 7, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #816. (Pet. for mandamus.) City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Worcester, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, begun and holden at Worcester, within and for our said county of Worcester, on the second Tuesday of April, being the eighth day of said month, in the year of our Lord one thousand nine hundred and two, it is thus contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within Said County and Commonwealth, Petitioner,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

Petition for a Writ of Mandamus.

To the honorable the justices of the supreme judicial court:

Respectfully represents the City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Trumbull, Green, Millbury and Greenwood streets in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company con-

structed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the pavement upon Millbury street and particularly upon that portion thereof lying between Vernon square and the bridge over the Blackstone river at Quinsigamond, except that part lying between the westerly or southerly rail and the westerly or southerly curb between Cambridge street and said bridge, all of which portion was paved originally by said respondent company and was required to be so paved by the conditions of said location, has become worn out, uneven, rough, unfit for further use and dangerous to travel, and said respondent company has failed to maintain said pavements and to keep said pavements in repair to the satisfaction of the proper city officers of the city of Worcester; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance and keeping in proper repair of pavements upon said Millbury street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance and keeping in proper repair of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain and keep in proper repair said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain and keep in proper repair said pavements.

Wherefore your petitioner prays that a writ of mandamus may issue to compel the said Worcester Consolidated Street Railway Company to perform its public duty in the premises and to compel said respondent company to maintain and keep in proper repair said pavement upon said portions of said Millbury street and for such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
Street Commissioner.

WORCESTER, *ss:*

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
Justice of the Peace.

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track on Trumbull street, Green and Millbury street and Greenwood street to Millbury line. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester, as follows to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track at Greenwood street, and the
13 same is hereby accordingly located upon the following conditions.

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: In Green street from the Boston and Albany railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall
14 have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said

company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be *required* by said committee and the expense of such repairs shall be paid by the said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where the surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

15 Fourth. All necessary strengthening of road bridges shall be made by said company, and the expense thereof shall be borne by it, and whatever strengthening of bridges is necessary shall be determined by the joint standing committee on highways and sidewalks.

Fifth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Sixth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks, and shall be located at such points along the line of said location as the said committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire, shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

16 Seventh. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition and to the satisfaction of said committee and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting said wires to be done to the acceptance of said committee and under the direction of the superintendent of fire alarm telegraph.

Eighth. At all such points where the stringing of feed trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets and all expense incurred in the changing of said bridges brackets or other appliances shall be paid for by said railway company.

Ninth. That in the care and maintenance of said railway the removal of snow and other obstructions from said location shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

17 Tenth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance and be completed and in operation within eighteen months thereafter.

Eleventh. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Accepted, Worcester, May 9th, 1893.

Filed Feb. 18, 1901.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and the same was presented to one of the justices thereof on the twentieth day of said February, who ordered endorsed thereon the following: Ordered that notice issue returnable first Tuesday March, at Boston.

Attest: JOHN NOBLE, *Clerk.*

And thereupon an order of notice was issued as follows, to wit:

18 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Supreme Judicial Court.

FEBRUARY 20TH, A. D. 1901.

On the petition aforesaid, it is ordered, that the petitioner notify the said The Worcester Consolidated Street Railway Company to appear at this court, at Boston, in our county of Suffolk, on the first Tuesday of March next, by serving it with an attested copy of said petition and this order forthwith, that it may, then and there, shew cause why the prayer of said petition should not be granted.

Attest: T. S. JOHNSON, *Clerk.*

And return of service was afterwards made by the officer who served the same in the words and figures following, to wit:

19 WORCESTER, ss:

WORCESTER, *February* 27, *A. D.* 1901.

By virtue hereof I this day at 4:55 o'clock p. m. made service of the within petition and order of court thereon, by giving in hand a true and attested copy thereof to A. H. Stone, treasurer of the within named Worcester Consolidated Street Railway Company.

JAS. M. DRENNAN,
Deputy Sheriff.

Service	.50
Travel	.08
Copy	2.00
	2.58

20 And on the third day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

Respondent's Demurrer to Petition for a Writ of Mandamus.

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the petitioner to maintain its petition, and assigns the following causes for its demurrer.

21 1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said petitioner.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this respondent, and that this respondent does not owe any duty and is under no obligations imposed by law to the petitioner.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this respondent in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
22 impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should maintain block paving or any other form of

paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the respondent's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the respondent's tracks and eighteen inches on each side of the portion occupied by the respondent's tracks.

6. For that by the general laws now in force this respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

23 7. For that it is the duty of the city of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this respondent derived its charter and all its corporate powers has by statute relieved this respondent of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost *of* to said city of the work done by it, which was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this re-
24 spondent has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said petitioner the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the petitioner, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WARREN & GARFIELD,
Att'ys for Respondent.

I hereby certify that I am of the opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry and that the same is not intended merely for delay.

BENTLEY W. WARREN,
One of the Attorneys for Respondent.

Filed April 3d, 1901

25 And on said third day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

Answer of Respondent to the Petition for a Writ of Mandamus.

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceeding and for answer to the petition of the City of Worcester admits the allegations contained in the first, second, third, fourth and fifth paragraphs
26 of the petition, but denies each and all of the allegations in the sixth paragraph of said petition contained.

And further answering this respondent says that the petitioner is not entitled to the issuance of a writ of mandamus out of this court because the petition is not properly signed by or on behalf of the City of Worcester and because the same should not be brought by said city, because said city has no jurisdiction over this respondent, and because by the provisions of chapter 578 of the Acts of 1898 and other laws of said Commonwealth now in force this respondent is not required to keep any portion of the surface materials of streets, roads and bridges in repair, and because the condition in the grant of the extension of location, a copy of which is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location, and because the condition that this respondent should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets, those
27 portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose and was invalid and void and not binding upon this respondent; and because by the provisions of said chapter 578 of the Acts of the Year 1898 this respondent was relieved from the duty of keeping in repair any portion of streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its railway, and that it has duly and punctually paid to the city of Worcester the amount of all taxes assessed upon it under the pro-

visions of said act, and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax and this respondent says that said city has never taken proceedings to have the amount of said tax increased
28 according to law; and this respondent says that it is the duty of said city to keep in repair at the expense of said city the highways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

And further answering this respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair, and denies that any portions of the streets named in said location have become unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed April 3d, 1901.

29 Thereupon, on the twenty-ninth day of said April the parties appeared and a hearing was had upon the petition and demurrer, and the case was reserved upon the same by the presiding justice for the consideration of the full court, said reservation being in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RLWY. Co. } Nos. 816 & 817.

Reservation.

These cases were heard by me on the petitions for mandamus and demurrers. The parties agreed that the locations set out in said petitions were granted under the provisions of section 21 of chapter 113 of the Public Statutes, that no question of the form of procedure or of the proper parties should be insisted upon, but both desired to obtain the decision of the court on the substantive question, whether or not under the law applicable to the cases at the time when
30 these petitions were filed the stipulations or conditions requiring the respondent to pave and perform other active duties as set forth in the grants of locations are binding upon the respondent. If the court answers this question in the affirmative,

the writs are to issue; if otherwise, the petitions are to be dismissed.

OLIVER WENDELL HOLMES, *C. J.*

Filed April 29th, 1901.

31 And thence the case was continued, and afterwards, to wit: on the fourteenth day of July, A. D. 1902, the parties appeared and it was ordered by said supreme judicial court by its rescript as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the supreme judicial court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Demurrer sustained and petition dismissed with costs.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

32 Whereupon the following order for dismissal was issued by our said court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

CITY OF WORCESTER, Petitioner,
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, Respondent.

Final Decree.

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript of the supreme judicial

court, it is ordered that this petition be dismissed and that the defendant's costs be taxed by the clerk and paid by the petitioner.

By the court,

T. S. JOHNSON, *Clerk.*

April 8th, 1903.

33 All and singular which the premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Marcus P. Knowlton, chief justice of our said supreme judicial court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

[SEAL.] T. S. JOHNSON, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Petition for Writ of Error and Assignment of Errors.

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record of this case:

That on the 10th day of April, 1893, the board of aldermen of the city of Worcester acting under section 21 of chapter 113 of the Public Statutes, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester, as follows:—

Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track of Greenwood street;

and that said location and extension was granted under restrictions and conditions set out at length in the record in said cause.

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the Supreme judicial court of the Commonwealth of Massachusetts,

holden at Worcester within and for the county of Worcester
35 and files herewith its assignment of errors as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof, to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof, to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obli-
36 gation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the city of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
City Solicitor and Attorney for Plaintiff.

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error. Assignment of errors. Filed Sept. 30th, 1903. Attest, T. S. Johnson, clerk.

37 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
vs.
SAME.

In Supreme Judicial Court. Petitions Writs of Mandamus.

SAME
vs.
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
SAME.

SAME
vs.
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

38 BARKER, *J.:*

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are

here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
39 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
40 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
41 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a

limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among
which had been that of paving and keeping in repair more
42 of the street than was required by the general law, and also
that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in
the city or town as to whose streets, roads or bridges there
43 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the deter-

mination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petition dismissed.

So ordered.

43½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

44 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * twenty-eighth day of November next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of the Commonwealth of Massachusetts in the county of Worcester, wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, chief justice of the supreme judicial court of Massachusetts, this thirty-first day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARCUS P. KNOWLTON,
C. J. S. J. C.

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* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,
Attorney for the Worcester Consolidated Street Railway Co.

45 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

I, Theodore S. Johnson, clerk of the supreme judicial court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record in the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company on a petition for a writ of mandamus in said supreme judicial court, determined and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the [SEAL.] seal of said court, this twelfth day of November, in the year of our Lord one thousand nine hundred and three.

T. S. JOHNSON, *Clerk.*

[Endorsed:] #816 City of Worcester (pet. for mandamus) *vs.* Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19137. Massachusetts supreme judicial court. Term No. 486. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19137.

(19,138.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 487.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester, plaintiff and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-eighth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the thirty-first day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
By BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by—
MARCUS P. KNOWLTON,
C. J. S. J. C.

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

And now, here, the judges of the supreme judicial court make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said supreme judicial court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[SEAL.] THEODORE S. JOHNSON, *Clerk.*

3 *Bond.*

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the supreme judicial court of Massachusetts holden at Worcester within and for the county
4 of Worcester, in a suit depending in said court, between The City of Worcester, plaintiffs, and The Worcester Consolidated

Street Railway Company, defendant, in a petition for a writ of mandamus a judgment and final order was rendered against the said plaintiff dismissing its said petition and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
5 THE AMERICAN BONDING CO.,
[L. S.] By JOHN R. THAYER, *Vice Pres't.*
Attest:
ANDREW B. McGOWN, *Ass't Sec'y.*

Approved:
MARCUS P. KNOWLTON,
C. J. S. J. C.

Bond approved.
FRANCIS H. DEWEY,
Att'y for Wor. Con. St. R'lway Co.

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Marcus P. Knowlton, chief justice, and filed November 7, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #817. (Pet. for mandamus.) City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, begun and holden at Worcester, within and for our said county of Worcester, on the second Tuesday of April, being the eighth day of

said month, in the year of our Lord one thousand nine hundred and two, it is thus contained :—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

Petition for a Writ of Mandamus.

To the honorable the justices of the supreme judicial court:

Respectfully represents the City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Pleasant streeet westerly in and from Park avenue to June street in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions,

9 is hereto annexed and marked "A."

Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing

by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company constructed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars, and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the block paving between the rails of each track, in the whole space between the tracks and for the space of eighteen inches outside the tracks, has become worn out, uneven, rough, unfit for further use and dangerous for travel; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance of pavements upon said Pleasant street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain said pavements.

Wherefore your petitioner prays that a writ of mandamus may issue to compel the said Worcester Consolidated Street Railway Company to perform its public duty in the premises and to compel said respondent company to maintain said pavement upon said portions of said Pleasant street and for such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
Street Commissioner.

WORCESTER, ss:

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
Justice of the Peace.

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track from its present tracks in Park avenue at its junction with Pleasant street through Pleasant street to June street. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows, to wit:

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street, and the same is
13 hereby accordingly located upon the following conditions:

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of
14 said streets, and at such points in the location of said tracks where surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

Fourth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks, and that the position of all turnouts, crossovers and spur tracks shall be located by said committee.

Fifth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such a height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

Sixth. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee and wherever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting of said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Seventh. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Eighth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Ninth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Tenth. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Worcester, May 9th, 1893.

Accepted.

Filed Feb. 18, 1901.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and the same was presented to one of the justices thereof on the twentieth day of said February, who ordered endorsed thereon the following:—Ordered that notice issue returnable first Tuesday March, at Boston.

Per order Lathrop J.

Attest: JOHN NOBLE, *Clerk.*

And thereupon an order of notice was issued as follows, to wit:—

17 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

FEBRUARY 20TH, A. D. 1901.

On the petition aforesaid, it is ordered, that the petitioner notify the said The Worcester Consolidated Street Railway Company to appear at this court, at Boston, in our county of Suffolk, on the first Tuesday of March next, by serving it with an attested copy of said petition and this order forthwith, that it may, then and there, shew cause why the prayer of said petition should not be granted.

Attest: T. S. JOHNSON, *Clerk.*

And return of service was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February 27th, A. D.* 1901.

By virtue hereof I this day at 4:55 o'clock p. m. made service of the within petition and order of court thereon, by giving in hand a true and attested copy thereof to A. H. Stone, treasurer of the within named Worcester Consolidated Street Railway Company.

Service	.50
Travel	.08
Copy	2.00
	2.58

JAS. M. DRENNAN,
Deputy Sheriff.

18 And on the third day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent. } No. 817.

Respondent's Demurrer to Petition for a Writ of Mandamus.

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the petitioner to maintain its petition, and assigns the following causes for its demurrer.

19 1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said petitioner.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this respondent, and that this respondent does not owe any duty and is under no obligations imposed by law to the petitioner.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this respondent in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
20 impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should maintain block paving or any other form of paving or surface material in any portions of such of said streets as

were paved, excepting the portions of said streets occupied by the respondent's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the respondent's tracks and eighteen inches on each side of the portion occupied by the respondent's tracks.

6. For that by the general laws now in force this respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the city of Worcester and the
21 proper officers of said city to keep in repair, at the expense, of said city, highways, townways, streets, causeways and bridges so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this respondent derived its charter and all its corporate powers has by statute relieved this respondent of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost of to said city of the work done by it, which — was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this respondent has not duly and punctually paid said excise tax in the manner provided by law.

22 10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said petitioner the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the petitioner, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WARREN & GARFIELD,
Att'ys for Respondent.

I hereby certify that I am of the opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry and that the same is not intended merely for delay.

BENTLEY W. WARREN,
One of Attorneys for Respondent.

Filed April 3d, 1901.

23 And on said third day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth,. Respondent. } No. 817.

Answer of Respondent to the Petition for a Writ of Mandamus.

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceeding and for answer to the petition of the City of Worcester admits the allegations contained in the first, second, third, fourth and fifth paragraphs of the petition, but denies each and all of the allegations in the
24 sixth paragraph of said petition contained.

And further answering this respondent says that the petitioner is not entitled to the issuance of a writ of mandamus out of this court because the petition is not properly signed by or on behalf of the City of Worcester and because the same should not be brought by said city, because said city has no jurisdiction over this respondent, and because by the provisions of chapter 578 of the Acts of 1898 and other laws of said Commonwealth now in force this respondent is not required to keep any portion of the surface materials of streets, roads and bridges in repair, and because the condition in the grant of the extension of location, a copy of which is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location, and because the condition that this respondent should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets, those
25 portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose and was invalid and void and not binding upon this respondent; and because by the provisions of said chapter 578 of the Acts of the Year 1898 this respondent was relieved from the duty of keeping in repair any portion of streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its

railway, and that it has duly and punctually paid to the city of Worcester the amount of all taxes assessed upon it under the provisions of said act, and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax and this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law; and this respondent says that it is the duty of said city to keep in repair at the expense of said city the high-
26 ways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

And further answering this respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair, and denies that any portions of the streets named in said location have become unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.

Filed April 3d, 1901.

27 Thereupon, on the twenty-ninth day of said April the parties appeared and a hearing was had upon the petition and demurrer, and the case was reserved upon the same by the presiding justice for the consideration of the full court, said reservation being in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RLWY. CO. } Nos. 816 & 817.

Reservation.

These cases were heard by me on the petitions for mandamus and demurrers. The parties agreed that the locations set out in said petitions were granted under the provisions of section 21 of chapter 113 of the Public Statutes, that no question of the form of procedure or of the proper parties should be insisted upon, but both desired to obtain the decision of the court on the substantive question, whether or not under the law applicable to the cases at the time when
28 these petitions were filed the stipulations or conditions requiring the respondent to pave and perform other active

duties as set forth in the grants of locations are binding upon the respondent. If the court answers this question in the affirmative, the writs are to issue; if otherwise, the petitions are to be dismissed.

OLIVER WENDELL HOLMES, *C. J.*

Filed April 29th, 1901.

29 And thence the case was continued, and afterwards, to wit: on the fourteenth day of July, A. D. 1902, the parties appeared and it was ordered by said supreme judicial court by its rescript as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the supreme judicial court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Demurrer sustained and petition dismissed with costs.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

30 Whereupon the following order for dismissal was issued by our said court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

CITY OF WORCESTER, Petitioner,
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, Respondent.

Final Order.

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript of the supreme judicial

court, it is ordered that this petition be dismissed and that the defendant's costs be taxed by the clerk and paid by the petitioner.

By the court,

T. S. JOHNSON, *Clerk.*

April 8th, 1903.

31 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Marcus P. Knowlton, chief justice of our said supreme judicial court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

[SEAL.] T. S. JOHNSON, *Clerk.*

32 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Petition for Writ of Error and Assignment of Errors.

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record of this case:

That on the 10th day of April, 1893, the board of aldermen of the city of Worcester acting under section 21 of chapter 113 of the Public Statutes, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester, as follows:—

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street,

and that said location and extension was granted under restrictions and conditions set out at length in the record in said cause.

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the supreme judicial court of the Commonwealth of Massachusetts,

holden at Worcester within and for the county of Worcester, and files herewith its assignment of errors as follows, to wit:

33 1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof, to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obli-

34 gation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the city of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
City Solicitor and Attorney for Plaintiff.

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

35 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
vs.
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
vs.
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
SAME.

SAME
vs.
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

36 BARKER, *J.:*

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are

here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
37 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
38 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
39 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the

other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
40 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
41 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force

when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

So ordered.

41½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

42 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * twenty-eighth day of November next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of the Commonwealth of Massachusetts in the county of Worcester, wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, chief justice of the supreme judicial court of Massachusetts, this thirty-first day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARCUS P. KNOWLTON,
C. J. S. J. C.

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* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

UNITED STATES OF AMERICA,
District of Massachusetts, Worcester County, } *ss:*

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.
F. H. DEWEY,
Attorney for the Worcester Consolidated Street Railway Co.

43 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

I, Theodore S. Johnson, clerk of the supreme judicial court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record in the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a petition for a writ of mandamus in said supreme judicial court, determined and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the [SEAL.] seal of said court, this twelfth day of November, in the year of our Lord one thousand nine hundred and three.

T. S. JOHNSON, *Clerk.*

[Endorsed:] #817 (Pet. for mandamus.) City of Worcester *vs.* Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,138. Massachusetts supreme judicial court. Term No. 487. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19,138.

(19,139.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 488.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester and The Board of Aldermen of the City of Worcester plaintiffs and The Worcester Consolidated Street Railway Company defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester and Board of Aldermen of the City of Worcester as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,

Allowed by—
ALBERT MASON.
Chief Justice Superior Court.

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

3 *Bond,* 1437.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester and others, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a bill in equity a judgment and final order was rendered against the said plaintiff- dismissing *its* said bill and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester and others shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
5 [L. S.] By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
Att'y for Wor. Con. St. R'lway Co.

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #1437. City of Worcester *vs.* Worcester Consolidated Street Railway Company. (Equity) Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Worcester, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court begun and holden at Fitchburg within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is thus contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

In Equity.

To the honorable justices of the superior court:

Respectfully represents the said City of Worcester.

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Trumbull, Green, Millbury and Greenwood streets in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company constructed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the pavement upon Millbury street and particularly upon that portion thereof lying between Vernon square and the bridge over the Blackstone river at Quinsigamond, except that part lying between the westerly or southerly rail and the westerly or southerly curb between Cambridge street and said bridge, all of which portion was paved originally by said respondent company, and was required to be so paved by the conditions of said location, has become worn out, uneven, rough, unfit for further use and dangerous to travel, and said respondent company has failed to maintain said pavements and to keep said pavements in repair to the satisfaction of the proper city officers of the city of Worcester; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance and keeping in proper repair of pavements upon said Millbury street; but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance and keeping in proper repair of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain and keep in proper repair said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain and keep in proper repair said pavements.

Wherefore your petitioner prays that—

1. A mandatory injunction may issue against said defendant company to direct it forthwith to put in proper repair the pavements upon said portions of Millbury street.

2. A mandatory injunction may issue against said defendant company to direct it to maintain and keep in proper repair the pavements upon said portions of Millbury street.

3. An injunction may issue to compel said defendant company to perform all duties and obligations imposed on it by said location with reference to pavements.

4. For such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
Street Commissioner.

12 WORCESTER, *ss:*

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
Justice of the Peace.

13 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track on Trumbull street, Green and Millbury street, and Greenwood street to Millbury line. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester, as follows to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track at Greenwood street,

14 and the same is hereby accordingly located upon the following conditions:

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: in Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location, for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curb-

stone on each side of said location over such portions of said
15 street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where the surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

16 Fourth. All necessary strengthening of road bridges shall be made by said company, and the expense thereof shall be borne by it, and whatever strengthening of bridges is necessary shall be determined by the joint standing committee on highways and sidewalks.

Fifth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Sixth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the said committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such height as to maintain said trolley-wire at every point
17 not less than eighteen feet above the surface of the street.

Seventh. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Eighth. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Ninth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall
18 be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Tenth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Eleventh. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Accepted, Worcester, May 9th, 1893.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and thereupon on said day a subpœna was issued returnable on the first Monday of March, 1901, at Worcester, as follows, to wit:—

19 [L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

To The Worcester Consolidated Street Railway Co., a duly organized corporation having its usual place of business at Worcester, in the county of Worcester, Greeting:

We command you that you appear before our justices of our superior court, at Worcester, within our county of Worcester, on the first Monday of March next, then and there to answer to a bill of complaint exhibited against you in our said court, by City of Worcester, a municipal corporation within said county of Worcester.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, Albert Mason, Esquire, the eighteenth day of February, in the year of our Lord one thousand nine hundred and one.

W. W. MACOMBER, *Ass't Clerk.*

20 And return of service on said subpœna was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February 18th, A. D.* 1901.

By virtue hereof I this day summoned the within named Worcester Consolidated Street Railway Company to appear at court and answer as within directed by giving in hand to Albert H. Stone its treasurer a true and attested copy of this precept.

Fees: Service	.50
Copy	1.00
Travel	.16
	$1.66

W. W. SCOTT,
Deputy Sheriff.

21 And on the ninth day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

Defendant's Demurrer.

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its petition, and assigns the
22 following causes for its demurrer.

1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which location is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
23 impose under the laws in force at the date of granting said extension of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the city of Worcester and the
24 proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

25 10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which

prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WORCESTER CONSOLIDATED ST. RY. CO.,
By WARREN & GARFIELD, *Its Attorneys.*

I, Bentley W. Warren, one of the attorneys of the above named respondent, The Worcester Consolidated Street Railway Company hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

BENTLEY W. WARREN.

Filed by c. Apr. 9, 1901.

26 And on said ninth day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Complainant,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Respondent.

Answer of Respondent.

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceedings, and for answer admits the allegations contained in the first, second, fourth and fifth paragraphs of the petition.

It admits the allegations of facts contained in the third paragraph of said petition, except that it denies that the terms and conditions of the location as therein referred to were required by the
27 public interest.

It denies each and all the allegations in the sixth paragraph of said petition contained.

(1.) And further answering the respondent says that the petitioner is not entitled to the issuance of an injunction out of this court because its petition is not properly signed by or on behalf of

the City of Worcester, and is not brought by the proper party to enforce said alleged right.

(2.) And further answering the respondent says that the petition should not be brought by said city because said city has no control or jurisdiction over this respondent.

(3.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of 1898, and all other laws of said Commonwealth, said respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

(4.) And further answering the respondent says that the condition in the grant of the extension of its location, a copy of which
28 grant of extension is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location.

(5.) And further answering the respondent says that the condition that the street railway company should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets those portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose, and was invalid and void and of no effect and not binding upon this respondent.

(6.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of the year 1898 this respondent was relieved from the duty of keeping in repair any portion of the streets, roads and bridges and was required instead of per-
29 forming that duty to pay an excise tax to the various cities and towns in which it operated its railway. And said respondent further says that it has duly and punctually paid to the City of Worcester the amount of all taxes assessed upon said respondent under the provisions of said act and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax. And this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law.

(7.) And further answering the respondent says that it is the duty of said city to keep in repair, at the expense of said city, highways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

(8.) And further answering the respondent denies that it has failed

to maintain and keep in repair any pavements which it is re-
30 quired by law to maintain and keep in repair; and further denies that any portions of the streets named in said location have become or are unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed by c. Apr. 9, 1901.

Thereupon, on the fourteenth day of June, 1901, the parties appeared and a hearing was had upon the petition and demurrer, and upon consideration thereof the court ordered the demurrer sustained and the petition dismissed by decree as follows, to wit:—

31 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

Superior Court. In Equity.

CITY OF WORCESTER }
vs. } # 1437.
WORCESTER CONSOLIDATED STREET RAILWAY CO. }

Decree.

This cause came on to be heard at this time and was argued by counsel upon the pleadings, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the defendant's demurrer be sustained and that the plaintiff's bill be, and the same hereby is, dismissed.

By the court.
Attest: W. W. MACOMBER,
Ass't Clerk.

Filed June 14th, 1901.

32 From this decree of the court the plaintiff appealed to the next sitting of the supreme judicial court. On the tenth day of October, 1901, the petitioner filed a motion to amend its bill, said motion being in the words following, to wit:

WORCESTER, *ss*:

Superior Court. In Equity.

CITY OF WORCESTER
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1437.

Plaintiff's Motion.

The plaintiff asks leave to amend its bill heretofore filed in the above entitled cause by joining as parties plaintiff Philip J. O'Connell, W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, all of said Worcester.

And to further amend said bill by striking out the first paragraph and inserting in place thereof the following:

"First. That said city of Worcester is a municipal corporation within said county and Commonwealth, that said Philip J.
33 O'Connell is mayor of said city of Worcester and W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, are all the members of the board of aldermen of said city of Worcester."

By ARTHUR P. RUGG, *Solicitor.*

And on said tenth day of October, 1901, said motion was allowed, the defendant consenting thereto; and thence the case was continued, and afterwards, to wit, on the seventeenth day of July, 1902, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

34 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCKSTER CONSOLIDATED STREET RAILWAY COMPANY. }

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Decree sustaining demurrer and dismissing bill affirmed.

By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

35 And on the fourth day of August, 1902, the following decree for dismissal was issued by said superior court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Final Decree.

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript from the supreme judicial court for the Commonwealth, it is ordered that this petition be dismissed.

By the court,
Attest: T. S. JOHNSON, *Clerk.*

Aug. 4, 1902.

36 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

37 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER and BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
WORCESTER CONSOLIDATED STREET RAILWAY CO.

Petition for Writ of Error and Assignment of Errors.

The City of Worcester and Board of Aldermen of the City of Worcester, plaintiffs in the above-entitled action, represent that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of

Worcester in Trumbull, Green, Millbury and Greenwood streets in said Worcester on the tenth day of April, eighteen hundred and ninety three, and granted said authority under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiffs' contention and adversely
38 to the existence of the Federal rights claimed.

Wherefore they respectfully petition for a writ of error to the superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and file herewith their assignment of errors as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface material of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the
39 streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

CITY OF WORCESTER AND
BOARD OF ALDERMEN OF THE
CITY OF WORCESTER,
By ARTHUR P. RUGG,
City Solicitor and Attorney for All said Plaintiffs.

39½ [Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

40 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
vs.
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
vs.
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
SAME.

SAME
vs.
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

41 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
42 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
43 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
44 mendation that authority should be granted to require "that a direct return should be made to the treasury of the munici-

pality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
45 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
46 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

So ordered.

46½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

47 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the the clerk's office of the † superior court of the Commonwealth of Massachusetts in the county of Worcester wherein The City of Worcester, and others are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

Attorney for the Worcester Consolidated Street Railway Co.

48 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a bill in equity, filed in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

[Endorsed:] #1437 (Bill in equity.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,139. Massachusetts superior court. Term No. 488. The City of Worcester and The Board of Aldermen of the City of Worcester, plaintiffs in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19,139.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 147.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

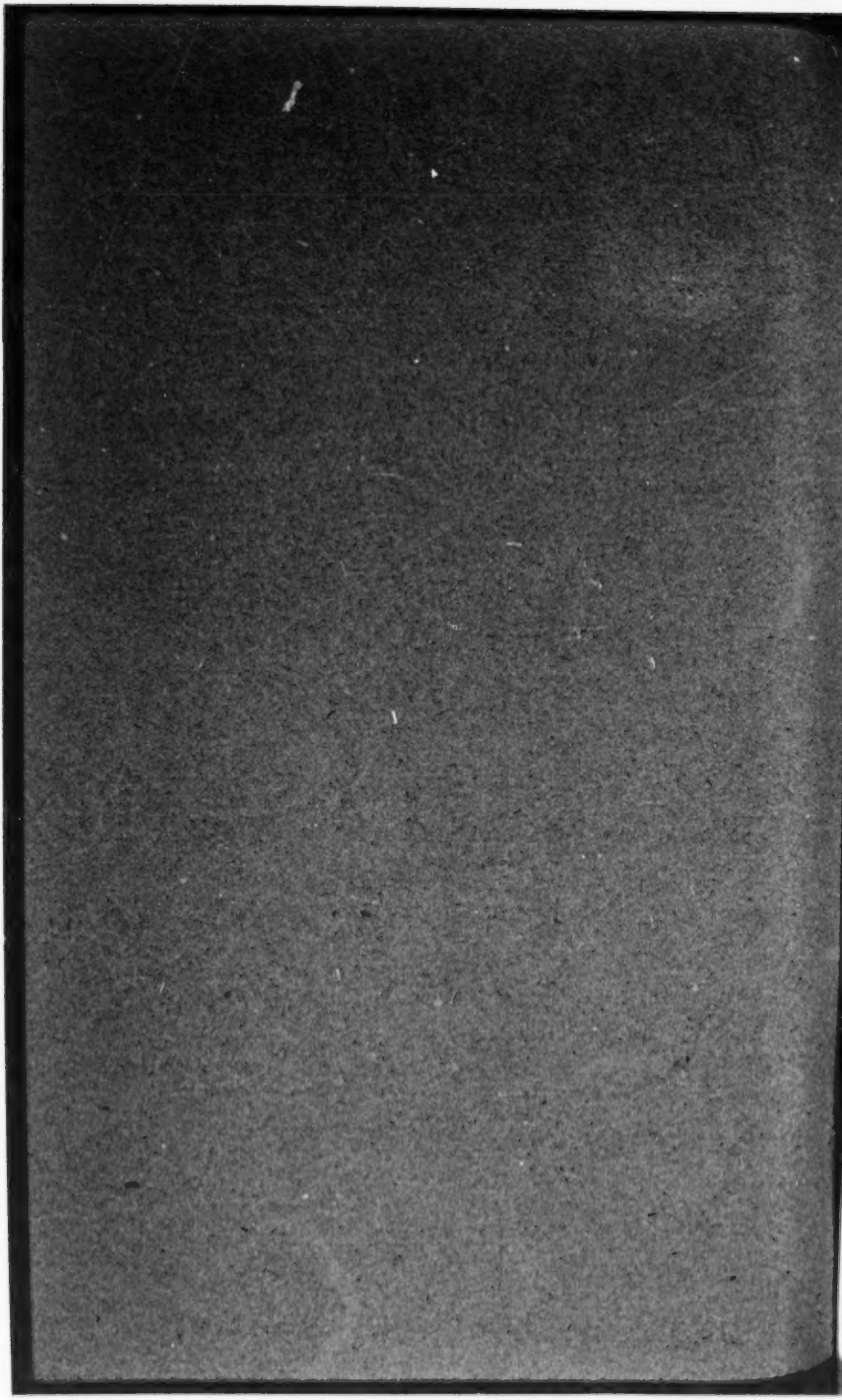
vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED NOVEMBER 23, 1903.

(19,140.)



(19,140.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 489.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

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1 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester plaintiff and The Worcester Consolidated Street Railway Company defendant, in an action of contract wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court.

1—489

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk*.

3 *Bond*, 1438.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester and others, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a bill in equity a judgment and final order was rendered against the said plaintiff- dismissing *its* said bill and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester and others shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
5 [L. S.] By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
Att'y for Wor. Con. St. R'lway Co.

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] # 1438. (Equity.) City of Worcester *vs.* Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss.:*
Worcester, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is this contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

To the honorable justices of the superior court:

Respectfully represents the said City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Pleasant street westerly in and from Park avenue to June street in said Worcester; that due notice was given of said petition and hearing thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company con-

structed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions, and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the block paving between the rails of each track, in the whole space
10 between the tracks and for the space of eighteen inches outside the tracks, has become worn out, uneven, rough, unfit for further use and dangerous for travel; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance of pavements upon said Pleasant street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain said pavements.

Wherefore your petitioner prays that—

1. A mandatory injunction may issue against said defendant company and direct it forthwith to put in proper repair the said block pavement in that portion of Pleasant street aforesaid.

2. A mandatory injunction may issue against said defend-
11 ant company to direct it to maintain and keep in proper repair block pavements upon that portion of Pleasant street aforesaid.

3. An injunction may issue to compel said defendant company to perform all duties and obligations imposed on it by said location with reference to pavements.

4. For such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
Street Commissioner.

WORCESTER, *ss*:

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me,—

ERNEST I. MORGAN,
Justice of the Peace.

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track from its present tracks in Park avenue at its junction with Pleasant street through Pleasant street, to June street. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore: It is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows to wit:

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street, and the same is hereby accordingly located upon the following conditions:

13 First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where surface water is impeded or obstructed, such means for its

14 disposal shall be provided as shall meet the approval of said committee.

Fourth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Fifth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

Sixth. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee, and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting of said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Seventh. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Eighth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Ninth. That the acceptance of this decree shall be made within thirty days from the date of said decree, and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Tenth. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Worcester, May 9th, 1893.

Accepted.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and thereupon on said day a subpœna was issued returnable on the first Monday of March, 1901, at Worcester, as follows, to wit:—

17 [L. S.] COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

To The Worcester Consolidated Street Railway Co., a duly organized corporation having its usual place of business at Worcester, in the county and Commonwealth aforesaid, Greeting:

We command you that you appear before our justices of our superior court, at Worcester, within our county of Worcester, on the first Monday of March next, then and there to answer to a bill of complaint exhibited against you in our said court, by the City of Worcester, a municipal corporation in the county of Worcester and Commonwealth of Massachusetts.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, Albert Mason, Esquire, the eighteenth day of February in the year of our Lord one thousand nine hundred and one.

W. W. MACOMBER, *Ass't Clerk.*

18 And return of service on said subpœna was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February* 18*th*, *A. D.* 1901.

By virtue of this precept I this day summoned the within named Worcester Consolidated Street Railway Company to appear at court and answer as within directed by giving a true and attested copy hereof in hand to Albert H. Stone, treasurer of said company.

Fees: Service	.50
Copy	1.00
Travel	.16
	1.66

W. W. SCOTT,
Deputy Sheriff.

19 And on the ninth day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

Defendant's Demurrer.

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its petition, and assigns the
20 following causes for its demurrer.

1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which location is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
21 impose under the laws in force at the date of granting said extension of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the

defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

22 7. For that it is the duty of the city of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

23 9. For that it no where appears in said petition that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WORCESTER CONSOLIDATED ST. RY. CO.,
By WARREN & GARFIELD, *Its Attorneys.*

I, Bentley W. Warren, one of the attorneys for the above named respondent, The Worcester Consolidated Street Railway Company certify that I am of opinion that there is such probable

24 ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

BENTLEY W. WARREN.

Filed by c. Apr. 9, 1901.

25 And on said ninth day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester.* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Complainant,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Respondent.

Answer of Respondent.

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceedings, and for answer admits the allegations contained in the first, second, fourth and fifth paragraphs of the petition.

26 It admits the allegations of facts contained in the third paragraph of said petition, except that it denies that the terms and conditions of the location as therein referred to were required by the public interest.

It denies each and all the allegations in the sixth paragraph of said petition contained.

(1.) And further answering the respondent says that the petitioner is not entitled to the issuance of an injunction out of this court because its petition is not properly signed by or on behalf of the City of Worcester, and is not brought by the proper party to enforce said alleged right.

(2.) And further answering the respondent says that the petition should not be brought by said city because said city has no control or jurisdiction over this respondent.

(3.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of 1898, and all other laws of said Commonwealth, said respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

27 (4.) And further answering the respondent says that the condition in the grant of the extension of its location, a copy of which grant of extension is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location.

(5.) And further answering the respondent says that the condition that the street railway company should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets those portions of the streets occu-

pied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose, and was invalid and void and of no effect and not binding upon this respondent.

28 (6.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of the year 1898 this respondent was relieved from the duty of keeping in repair any portion of the streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its railway. And said respondent further says that it has duly and punctually paid to the City of Worcester the amount of all taxes assessed upon said respondent under the provisions of said act and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax. And this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law.

(7.) And further answering the respondent says that it is the duty of said city to keep in repair, at the expense of said city, high-

29 ways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

(8.) And further answering the respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair; and further denies that any portions of the streets named in said location have become or are unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed by c. Apr. 9, 1901.

Thereupon on the fourteenth day of June, 1901, the parties appeared and a hearing was had upon the petition and demurrer, and upon consideration thereof the court ordered the demurrer sustained and the petition dismissed by decree as follows, to wit :—

30 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

Superior Court. In Equity.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY CO. } # 1438.

Decree.

This cause came on to be heard at this time and was argued by counsel upon the pleadings, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the defendant's demurrer be sustained and that the plaintiff's bill be, and the same hereby is, dismissed.

By the court.
Attest: W. W. MACOMBER, *Ass't Clerk.*

Filed June 14th, 1901.

31 From this decree of the court the plaintiff appealed to the next sitting of the supreme judicial court. On the tenth day of October, 1901, the petitioner filed a motion to amend its bill, said motion being in the words following, to wit:

WORCESTER, ss:

Superior Court. In Equity.

CITY OF WORCESTER
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1438.

Plaintiff's Motion.

The plaintiff asks leave to amend its bill heretofore filed in the above entitled cause by joining as parties plaintiff Philip J. O'Connell, W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, all of said Worcester.

And to further amend said bill by striking out the first paragraph and inserting in place thereof the following:

32 "First. That said city of Worcester is a municipal corporation within said county and Commonwealth, that said Philip J. O'Connell is mayor of said city of Worcester and W.

Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, are all the members of the board of aldermen of said city of Worcester."

By ARTHUR P. RUGG, *Solicitor.*

And on said tenth day of October, 1901, said motion was allowed, the defendant consenting thereto; and thence the case was continued, and afterwards, to wit, on the seventeenth day of July, 1902, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

33 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Decree sustaining demurrer and dismissing bill affirmed.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

34 And on the fourth day of August, 1902, the following decree for dismissal was issued by said superior court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss.:*

Superior Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Final Decree.

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript from the supreme judicial

court for the Commonwealth, it is ordered that this petition be dismissed.

By the court,

Attest: T. S. JOHNSON, *Clerk.*

Aug. 4, 1902.

35 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court. Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER and BOARD OF ALDERMEN OF THE CITY OF Worcester
v.
WORCESTER CONSOLIDATED STREET RAILWAY CO.

Petition for Writ of Error and Assignment of Errors.

The City of Worcester and Board of Aldermen of the City of Worcester, plaintiffs in the above-entitled action, represent that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester in Pleasant street westerly in and from Park avenue to June street in said Worcester on the tenth day of April, eighteen hundred and ninety three, and granted said authority under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiffs' contentions and adversely to the to the existence of the Federal rights claimed.

Wherefore, they respectfully petition for a writ of error to the
37 superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and file herewith their assignment of errors, as follows, to wit:—

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the strets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitu-
38 tion of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

CITY OF WORCESTER AND
BOARD OF ALDERMEN OF THE
CITY OF WORCESTER,
By ARTHUR P. RUGG,
City Solicitor and Attorney for All said Plaintiffs.

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

39 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
vs.
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
vs.
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
SAME.

SAME
vs.
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

40 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court

sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
41 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
42 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
43 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a

limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments, became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
44 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that 'street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
45 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the deter-

mination of these cases, and we express no opinion upon the question.

The result is that in the action at law the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

So ordered.

45½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

46 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the clerk's office of the † superior court of the Commonwealth of Massachusetts, in the county of Worcester wherein The City of Worcester, and others, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

Attorney for the Worcester Consolidated Street Railway Co.

47 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss*:

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a bill in equity, filed in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

[Endorsed:] #1438 (Bill in equity.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,140. Massachusetts superior court. Term No. 489. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23, 1903. File No. 19,140.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 464.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

FILED NOVEMBER 25, 1903.

(19,144)

(19,141.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 490.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester and The Board of Aldermen of the City of Worcester plaintiffs and The Worcester Consolidated Street Railway Company defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said City of Worcester and Board of Aldermen of the City of Worcester as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON.
Chief Justice Superior Court.

1—490

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss*:

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk*.

3 *Bond*, 1450.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in an action of contract a judgment and final order was rendered against the said plaintiff-, directing judgment to be entered for the defendant and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester — and shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
5 THE AMERICAN BONDING CO.,
By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
Att'y for Wor. Con. St. R'lway Co.

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] # 1450. City of Worcester *vs.* Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is this contained:—the following being the entire record of the case.

7 [L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester,

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Worcester Consolidated Street Railway Company, a corporation duly organized under the laws of said Commonwealth and having a usual place of

business in Worcester in said county, to the value of twenty-five thousand dollars, and summon the said defendant (if it may be found in your precinct) to appear before our justices of our superior court, at Worcester, within and for our said county of Worcester, on the first Monday of March next; then and there, in our said court, to answer unto the City of Worcester, a municipal corporation within said county.

In an action of contract.

To the damage of said plaintiff, as it saith, the sum of twenty-five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, Albert Mason, Esquire, at Worcester, the sixteenth day of February in the year of our Lord one thousand nine hundred and one.

T. S. JOHNSON, *Clerk.*

8 (*Copy of Officer's Return on Back of Writ.*)

By rules of court, officers' fees must be stated in separate items, and claims for extra compensation for removing or keeping property must be sworn to.

WORCESTER, *ss:*

WORCESTER, *February 18th, A. D.* 1901.

By virtue of this writ, I this day at forty minutes past eleven in the forenoon, attached as the property of the within named defendant cor. all its right, title and interest in and to any real estate in Worcester or elsewhere in the county of Worcester, and on the same day deposited an attested copy of this writ without the declaration, and with so much of my return thereon as relates to the attachment of real estate, in the office of the register of deeds for the Worcester district of said county, and afterwards on the same eighteenth day of February A. D. 1901 gave in hand to Albert H. Stone, treasurer of said defendant corporation a summons for its appearance at court as within directed.

W. W. SCOTT,
Deputy Sheriff.

Fees: Service		1.00
Travel, — miles		.16
" over 40 miles, — miles		
Copy		1.00
Travel to record, — miles		.08
Clerk's fee		.25
Use of team, — miles		
		$2.49

9 *Declaration.*

WORCESTER, *ss:*

Superior Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1450.

Plaintiff's declaration.

Count one. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the twenty-fourth day of April, 1893, the board of aldermen of the city Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the
10 location of its tracks in said city of Worcester as follows, to wit: Beginning at the end of the present double track in said Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue, and the same is hereby accordingly located upon the following conditions:"

That ten different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving between the rails, between the tracks, and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving in a proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

The said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester, and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said street, as required by the condition of said location, from curb to curb.

11 That by reason of the settling of the rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pave-

ment upon said Pleasant street between West street and Park avenue became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of fifteen hundred eighty-nine and 21/100 dollars, as set forth in the account hereto annexed, marked "A."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count two. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and
12 particularly under chapter 284 of the laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the end of the present double track in said Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue, and the same is hereby accordingly located upon the following conditions:"

That ten different conditions are set forth in said order among which is the following:

"Second. The said company shall lay and maintain block paving between the rails, between the tracks and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving in a proper state of repair, the same may be repaired by said
13 committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester, and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said street, as required by the conditions of said location, from curb to curb.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Pleasant street between West street and Park avenue became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repestedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of eleven hundred forty-four and 78/100 dollars, as set forth in the account hereto annexed, marked "B."

14 The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count three. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the tenth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 213 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows, to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street, thence crossing Trumbull square and continuing southerly on Green street to Millbury street, thence southerly on Millbury street to the terminus of the present track at Greenwood street, and the same is hereby accordingly located upon the following conditions:"

The eleven different conditions are set forth in said order, among which is the following:

15 "Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: In Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to

the bridge at Quinsigamond, crossing the Blackstone river, between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

16 Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company."

The said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said Millbury street, as required by the conditions of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Millbury street between Vernon square and the bridge at Quinsigamond became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with

17 said condition of its said location; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of two thousand one hundred and seventeen and 10/100 dollars, as set forth in the account hereto annexed, marked "C."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count four. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of

constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eleventh day of May, 1891, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use and extend the location of its tracks in said city of Worcester as follows: From its present tracks in Front street and Washington square through and
18 over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street, and through and over Belmont street to a point opposite the center of Lake avenue with the right to use horses or electricity as a motive power. And the same are hereby accordingly located upon the following conditions."

That eight different conditions are set forth in said order, among which is the following:

"Second. That block paving shall be laid and maintained between the rails of its track and for a distance of eighteen (18) inches outside of said rails for the entire distance covered by this location."

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present location of said company's tracks in Front street, thence easterly across Washington's square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly along Belmont street to Plantation street, and the same is
19 hereby accordingly located upon the following conditions:

That ten different conditions are set forth in said order, among which is the following:

"Second. Said company shall lay and maintain block paving along the line of its location as follows: From the Fitchburg Railroad crossing at Washington square to the easterly line of Lyon street, block paving shall be laid between the rails, between the tracks, and outside thereof to the line of the curbstones, and from said Lyon street to the easterly end of this location, block paving shall be laid between the rails, between the tracks and 18 inches outside of the tracks. And it is further provided that from the easterly line of Lyon street to Warden street such portions of the street as are outside of the pavements above specified, shall be paved with a thorough and substantial macadam pavement by the highway department of the city of Worcester, and the expense of the same shall be paid by said company. In case the said company shall fail to keep said pavements in a proper state of repair to the satisfaction of said committee, the same may be repaired by said

committee and the expense of such repairs shall be paid by said company."

That both of said locations were duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter and within the time, and as required by law the defendant constructed its tracks as authorized by said locations and began operating its cars over them and paved said Shrewsbury street, as required by the conditions of said locations.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Shrewsbury street between Lyon street and Belmont street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the conditions of its locations above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said conditions of its said locations; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of three thousand one hundred and twenty-five and 33/100 dollars, as set forth in the account hereto annexed, marked "D."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from August 12, 1899, the date of said demand.

Count five. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eleventh day of May, 1891, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use and extend the location of its tracks in said city of Worcester as follows: From its present tracks in Front street and Washington square through and over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street, and through and over Belmont street to a point opposite the center of Lake avenue, with the right to use horses or electricity as a motive power. And the same are hereby accordingly located upon the following conditions."

That eight different conditions are set forth in said order, among which is the following:

22 "Second. Taht block paving shall be laid and maintained between the rails of its tracks and for a distance of eighteen (18) inches outside of said rails for the entire distance covered by this location."

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows to wit: Beginning at the present location of said company's tracks in Front street, thence easterly across Washington square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly along Belmont street to Plantantion street, and the same is hereby accordingly located upon the following conditions:

That ten different conditions are set forth in said order, among which is the following:

"Second. Said company shall lay and maintain block paving along the line of its location as follows: From the Fitchburg Railroad crossing at Washington square to the easterly line of Lyon street, block paving shall be laid between the rails between the
23 tracks and outside thereof to the line of the curbstones, and from said Lyon street to the easterly end of this location, block paving shall be laid between the rails, between the tracks and 18 inches outside of the tracks. And it is further provided that from the easterly line of Lyon street to Warden street such portions of the street as are outside of the pavements above specified, shall be paved with a thorough and substantial macadam pavement by the highway department of the city of Worcester, and the expense of the same shall be paid by said company. In case the said company shall fail to keep said pavements in a proper state of repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That both of said locations were duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said locations and began operating its cars over them, and paved said Shrewsbury street, as required by the conditions of said locations.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the or-
24 dinary, common and customary use of said street the pavement upon said Shrewsbury street between the Fitchburg Railroad crossing at Washington square and the easterly line of Lyon street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and

maintain said pavement in compliance with the conditions of its locations above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said conditions of its said locations; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of seven hundred and sixty-three and 27/100 dollars, as set forth in the account hereto annexed, marked "E."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count six. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along
25 and through streets and ways of the city of Worcester.

That on the eighth day of May, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present tracks in Salisbury street, thence northerly along Grove street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square, and the same is hereby according— located upon the following conditions:"

That eleven different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving as follows: From Salisbury street to Salisbury pond, block paving shall be laid between the rails, between the tracks and outside thereof to the lines of the curbstones. From Salisbury pond, on its southerly side to the end of this location, block paving shall be laid between the rails and tracks and outside thereof for the space of 18 inches, and for the remaining width of the streets to the lines of the curbstones, macadam pavement shall be laid by the highway
26 department of said city and the expense thereof shall be paid by said company. The quality of the blocks and the manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks and if said company shall fail to keep said pavement in a safe and proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began

operating its cars over them, and paved said Grove street, as required by the condition of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Grove street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to com-
27 ply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of one thousand two hundred and eighty-two and 70/100 dollars, as set forth in the account hereto annexed, marked "F."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from June 14, 1900, the date of said demand.

Count seven. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eighth day of May, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present tracks in Salisbury street, thence northerly along Grove
28 street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square, and the same is hereby accordingly located upon the following conditions:"

That eleven different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving as follows: From Salisbury street to Salisbury pond, block paving shall be laid between the rails, between the tracks and outside thereof to the lines of the curbstones. From Salisbury pond, on its southerly side to the end of this location, block paving shall be laid between the rails and tracks and outside thereof for the space of 18 inches, and for the remaining width of the streets to the lines of the curbstones, macadam pavement shall be laid by the highway department of said city and the expense thereof shall be paid by said

company. The quality of the blocks and the manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks and if said company shall fail to keep said pavement in a safe and proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worces-
29–72 ter and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said Grove street, as required by the condition of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Grove street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of eight and 94/100 dollars, as set forth in the account hereto annexed, marked "G."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from September 3, 1900, the date of said demand.

73 This action was entered at the March return day, 1901, when the parties appeared, and on the twenty-sixth day of April, 1901, the plaintiff filed its declaration, the defendant consenting thereto, and on the fourteenth day of June, 1901, the defendant filed its demurrer, by consent of plaintiff, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Superior Court.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY CO. } No. —.

Defendant's Demurrer.

And now comes the Worcester Consolidated Street Railway Company and demurs to the declaration of the City of Worcester, and to each count thereof, and says that the said declaration and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its action, and assigns the following causes for its demurrer.

1. For that it nowhere appears in said declaration that said action is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

74 2. For that the City of Worcester as a municipal corporation has no interest in the subject matter of said declaration, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grants of location referred to in the plaintiff's declaration, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to impose under the laws in force at the dates of granting said locations and extensions of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said orders of location and extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said

75 locations and extensions of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except

those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the City of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair,

76 and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said City of Worcester, and if said portion of said excise tax so payable to the City of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it nowhere appears in said declaration that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it nowhere appears in said declaration that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said declaration any facts which entitled it to judgment.

By its attorneys, WARREN & GARFIELD.

Filed by c. June 14, 1901.

77 And on said fourteenth day of June, 1901, the said demurrer was sustained and judgment ordered for the defendant, from which judgment the plaintiff appealed to the next sitting of the supreme judicial court, holden for said county, and thence the case was continued,—and on the seventeenth day of July, 1902, it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:—
Order sustaining demurrer affirmed.
Order *for* entering judgment for defendant affirmed.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

It is therefore considered by said superior court, to wit,—on the fourth day of August, 1902, that the said Worcester Consolidated Street Railway Company recover against the City of Worcester its costs of suit taxed at forty-nine dollars and twenty-seven cents.

78 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

79 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
v.
WORCESTER CONSOLIDATED STREET RAILWAY CO.

Petition for Writ of Error and Assignment of Errors.

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester—

Beginning at the end of the present double track in Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue in said Worcester, on the 24th day of April, 1893, and beginning at a point in Trumbull street at its intersection with the northerly line of Park street, thence crossing Trumbull square and continuing southerly on Green street to Millbury street, thence southerly on Millbury street to the terminus of the present track at Greenwood street in said Worcester, on the tenth day of April, 1893, and from its present tracks in Front street at Washington square through and over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street and through and over Belmont street to a point opposite the center of Lake avenue, in the city of Worcester, on the
80 eleventh day of May, 1893, and from said company's tracks in Front street easterly across Washington square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly on Belmont street to Plantation street on the twenty-fourth day of April, 1893, and beginning at the tracks in Salisbury, thence northerly along Grove street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square in the city of Worcester, on the eighth of May, 1893;—and that all said several locations and extensions were granted under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and files herewith its assignment of errors, as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligations so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them
81 without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the con-

stitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
City Solicitor and Attorney for Plaintiff.

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors. Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

82 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
vs.
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
vs.
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
vs.
SAME.

SAME
vs.
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

83 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered

for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
84 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
85 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
86 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using

the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among
which had been that of paving and keeping in repair more
87 of the street than was required by the general law, and also
that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in
the city or town as to whose streets, roads or bridges there
88 might be a question. St. 1898, c. 578, § 1. Springfield *v.*
Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were

valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

So ordered.

88½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

89 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the clerk's office of the † superior court of the Commonwealth of Massachusetts in the county of Worcester wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

Attorney for the Worcester Consolidated Street Railway Co.

90 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, in an action of contract, entered in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with—

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

91 UNITED STATES OF AMERICA:

Supreme Court of the United States.

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } # 490.

It is agreed that in the above entitled cause the tables contained in the record may be omitted in the printing.

GEO. F. HOAR,
ARTHUR P. RUGG,
City Solicitor and Attorney for Plaintiff.
F. H. DEWEY,
President of and Attorney for Defendant.

92 [Endorsed:] File No. 19141. Supreme Court U. S. October term, 1903. Term No. 490. The City of Worcester *et al.* pl'ff in error *vs.* The Worcester Consolidated Street Ry. Company. Stipulation to omit part of record in printing. Filed Dec. 16, 1903.

[Endorsed:] # 1450. (Action at law.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,141. Massachusetts superior court. Term No. 490. The City of Worcester and The Board of Aldermen of the City of Worcester, plaintiffs in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23rd, 1903. File No. 19,141.

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Clerk

SUPREME COURT OF THE UNITED STATES.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Two Cases.

Number 144, October Term, 1904.

Number 145, October Term, 1904.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
Plaintiffs in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Two Cases.

Number 146, October Term, 1904.

Number 148, October Term, 1904.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Number 147, October Term, 1904.

BRIEF FOR THE PLAINTIFFS IN ERROR.

ARTHUR P. RUGG,
Counsel for Plaintiffs in Error.

[19137, 19138, 19139, 19140, 19149.]

JOHN R. THAYER,

SUPREME COURT OF THE UNITED STATES.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

TWO CASES.
Number 144, October Term, 1904.
Number 145, October Term, 1904.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
Plaintiffs in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

TWO CASES.
Number 146, October Term, 1904.
Number 148, October Term, 1904.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Number 147, October Term, 1904.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

These are five cases, two being petitions for writs of mandamus, brought originally in the Supreme Judicial Court of Massachusetts, and two being bills in equity brought in the Superior Court for the County of Worcester in the Commonwealth of Massachusetts under the provisions of section 63 of chapter 113 of the Public Statutes of Massachusetts as amended by chapter 293 of the Massachusetts laws of 1891, and one being an action of contract brought originally in the Superior Court for the County of Worcester in said Commonwealth, brought to ascertain the legal effect of conditions contained in locations granted to the defendant in error in certain streets of Worcester. The same questions, so far as the present inquiry is concerned, are raised in all the cases, the different processes having been sought that there might be no failure in remedy by reason of a misconception as to the proper form of action.

The defendant in error is a street railway corporation established under the laws of the Commonwealth of Massachusetts, and especially under chapter 284 of the Laws of 1887, and prior to that time had locations in certain streets and ways in the city of Worcester.

At divers times, in 1891 and 1893, the defendants in error petitioned for extensions of its locations within the City of Worcester, under the provisions of section 21, chapter 113 of the Public Statutes of Massachusetts.

On April 10th, 1893, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, given an extension of its location for tracks upon Trumbull, Green, Millbury and Greenwood Streets in said Worcester, by an order or decree which is to be found in full upon printed pages 6, 7, 8 and 9 (original pages 12, 13, 14, 15, 16, 17) of the record in No. 144; and upon the same printed pages of the record in No. 146 (pages 13, 14, 15, 16, 17 and 18 of the original.) The extension of said tracks is stated in said order or decree to be "located upon the following conditions." Then follow eleven conditions. The second of said conditions is as follows:

> "That said company shall lay and maintain block paving over and upon said location and streets, as follows: in Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion

of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company."

The tenth paragraph of said location provided:

"That the acceptance of this decree shall be made within thirty days from the date of said decree."

This order or decree granting the extension of location was duly accepted in writing by the defendant in error, and its acceptance filed in the office of the City Clerk of the City of Worcester, all as required by said order or decree, within the said thirty days.

On the tenth day of April, 1893, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, the defendant in error was, by order or decree, given an extension of its location for tracks in said Worcester, in Park Avenue, through Pleasant to June Streets. Said order or decree of extension of location is to be found in full upon printed pages 6 and 7 (original pages 12, 13, 14, 15, 16) of the record in No. 145, and upon the same pages of the record in No. 147. Said order or decree of location stated that the extension of location of said tracks was "located upon the following conditions." Then follow ten conditions, the second of which is as follows:

"That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space

of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company."

The ninth condition in said order or decree of location requires:

"That the acceptance of this decree shall be made within thirty days from the date of said decree."

This order or decree granting the extension of location was duly accepted in writing by the defendant in error, and its acceptance filed in the office of the City Clerk of the City of Worcester, all as required by said order or decree, within the said thirty days.

On the twenty-fourth day of April, 1893, the defendant in error, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, was given an extension of its location for tracks on Pleasant Street, between West Street and Park Avenue, the order or decree granting said extension of location containing ten different conditions, the second of which was as follows:

"The said company shall lay and maintain block paving between the rails, between the tracks and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving

in a proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

This location was duly accepted in writing by the defendant in error and such acceptance filed in the office of the City Clerk of the City of Worcester within thirty days after its passage.

On the eleventh day of May, 1891, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, given an extension of its location for tracks in Washington Square, Shrewsbury and Belmont Streets, which extension is stated in the order or decree giving the same, to be "located upon the following conditions"; eight different conditions then follow, among which is the following:

> "Second. That block paving shall be laid and maintained between the rails of its track and for a distance of eighteen inches outside of said rails for the entire distance covered by this location."

This order or decree was duly accepted in writing by the defendant in error and its acceptance filed with the City Clerk of the City of Worcester.

On the twenty-fourth day of April, 1893, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, again given an extension of its location for tracks in Washington Square, Shrewsbury Street and a portion of Belmont Street, the order or decree giving the same stating that said tracks were "located upon the following conditions." Then ten different conditions follow, the second of which is printed upon printed pages 9 and 10 (original Page 19) of the record in No. 148, but which is in substance the

same as the second condition of the location in Trumbull, Green, Millbury and Greenwood Streets, given April 10, 1893, printed heretofore on pp. 3 and 4 of this brief and required the defendant in error to lay and maintain block paving between the rails, between its tracks and outside thereof to the line of the curb-stones over a portion of said location. This location was duly accepted by the defendant in error, in writing, and the acceptance filed with the City Clerk of the City of Worcester.

On the eighth of May, 1893 the defendant in error was, after due proceedings had in accordance with said section 21 of chapter 113 of the Public Statutes of Massachusetts, given an extension of location for its tracks upon Grove Street and Park Avenue, which tracks are stated in the order or decree granting the same to be "located upon the following conditions."

The second of said conditions is printed in full upon printed page 12 (original pages 25 and 26) of the record in No. 148, and required paving and maintenance of paving of entire street between curbs for a part of the street and between the rails and tracks and for a distance of eighteen inches outside thereof for the remainder of the distance. This location was duly accepted in writing by the defendant in error, which acceptance was filed with the City Clerk of the City of Worcester.

One petition for a writ of mandamus, being numbered 144 of this record, is brought to enforce the second condition of the location for tracks in Trumbull, Green, Millbury and Greenwood Streets, given on April 10, 1893. The bill in equity numbered 146 of this record, in which the Board of Aldermen were joined with the City of Worcester as plaintiffs in error, under the provisions of section 63, chapter 113 of the Public

Statutes of Massachusetts, as amended by chapter 293, Massachusetts Laws of 1891, is brought to enforce the same condition.

The second petition for a writ of mandamus, being numbered 145 of this record, is brought to enforce the second condition contained in the order or decree for location in Park Avenue, through Pleasant Street to June Street, and the bill in equity numbered 147, being by the same parties plaintiffs as in No. 146 and brought under the same provision of statute as No. 146, is to enforce the same condition.

The action of contract, the record in which is numbered 148, is brought to collect for expenditures made by the City of Worcester in repairing the block paving which, under the conditions of certain locations referred to at length in the declaration therein, was to be maintained in repair by the defendant in error. There are seven counts in the declaration in said action of contract, all the counts being founded upon restrictions, terms or conditions contained in grants of location. The first and second counts of said declaration are for expenditures made for repairs made at different times by the plaintiff in error for keeping in repair the block paving which the defendant in error was by its location of April 24, 1893 for extension of tracks in Pleasant Street between West Street and Park Avenue, required to maintain in repair. The third count is for expenditures made upon the same streets and by virtue of the same locations described in the first petition for a writ of mandamus, and in the first bill in equity, the records in which are numbered respectively 144 and 146. The fourth and fifth counts of the declaration relate to expenditures made under two different locations, the first one in each count being for expenditures made to repair the streets and portions of streets required by the

location of May 11, 1891, in Washington Square, Shrewsbury and Belmont Streets to be maintained in repair by the defendant in error, and the second location in each of said counts being for expenditures made upon the portions of streets required by the location of April 24, 1893, in Washington Square, Shrewsbury and Belmont Streets, to be maintained in repair by the defendant in error. The sixth and seventh counts of said declaration are for expenditures made in repairing the streets required by the location of May 8, 1893, in Grove Street and Park Avenue, to be maintained in repair by the defendant in error.

The pleadings of the plaintiff in error in all five cases allege the granting of the locations with the accompanying restrictions or conditions as hereinbefore described and the acceptance of them by the defendant in error, in writing, filed with the City Clerk of the City of Worcester, the laying of the tracks and doing of the work originally required by all said locations and a wearing-out, roughness and unfitness for further use of the paving upon the portions of streets required by said locations to be kept in repair by the defendant in error and a refusal by the defendant in error to make further repairs and to keep said streets safe for travel, as required by said restrictions or conditions. The petitions for writs of mandamus and the bills in equity contain prayers for mandatory relief to compel the defendant in error to make repairs and for other relief. The counts in the action in contract further allege the expenditure by the plaintiff in error of considerable sums of money, aggregating in all ten thousand thirty-one dollars and thirty-three cents (10,031.33), exclusive of interest, for the purpose of making the repairs which were required by the restrictions or conditions of locations, to be made by the defendant in error. The

defendant in error filed substantially the same demurrer in all the cases, the substance of which, so far as this proceeding is concerned, is

First, that the conditions contained in said grants of location were illegal and void, and

Second, that by Act of the Legislature of the Great and General Court of Massachusetts, chapter 578 of the Acts of Massachusetts for the year 1898, it had been relieved of any obligation to keep the streets in repair. The demurrers of the defendant in error were sustained upon the second of these grounds. The opinion of the Supreme Judicial Court of Massachusetts, printed in the record in each case (printed pages 16, 17, 18, and 19, original pages 38, 39, 40, 41, 42 and 43 of the record in No. 144, printed pages 16, 17, 18, and 19 original pages 35, 36, 37, 38, 39, 40 and 41 of No. 145, printed pages 17, 18, 19 and 20 original pages 40, 41, 42, 43, 44, 45 and 46 of No. 146, printed pages 17, 18, 19 and 20 original pages 39, 40, 41, 42, 43, 44 and 45 of the record of No. 147, and printed pages 20, 21, 22 and 23 original pages 82, 83, 84, 85, 86, 87 and 88 of the record of No. 148) a single opinion having been given for all the cases, as they were all five argued together before the Supreme Judicial Court of Massachusetts, refers, for the discussion of the constitutional grounds upon which the cases are decided adversely to the contention of the plaintiffs in error, to Springfield vs. Springfield Street Railway Company, 182 Massachusetts, Page 41. The opinion in the Springfield case decides as to the Federal constitutional questions raised that locations given to street railways in streets "do not constitute contracts, or if they do, they are of such a nature that the Legislature can modify or annul them without thereby violating the constitutional provisions", (182 Massachusetts, Page 48). The assignment of

errors by the plaintiff in error is the same in each of the five cases and is to be found upon printed page 15 (original pages 35 and 36) of the record in No. 144; printed page 15 (original pages 33 and 34) of the record in No. 145; printed page 16 (original pages 38 and 39) *of the record in No. 146*; printed page 16 (original pages 37 and 38) of the record in No. 147; and printed pages 18 and 19 (original pages 80 and 81), of the record in No. 148.

The assignments of error are five, in substance as follows:

1. The court erred in deciding that the effect of c. 578, Massachusetts Laws of 1898, was to free the Street Railway Company from all obligation to keep the surface material of streets in repair, unless imposed in the grants of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that the Legislature could modify or annul them without thereby violating the provisions of the constitution.

3. The court erred in deciding that it was within the constitutional power of the Legislature to free the defendant in error from obligations imposed upon it by the locations set out in the pleadings.

4. The court erred in deciding that the provisions of c. 578, Massachusetts Laws of 1898, relieving the defendant in error from all obligation thereof to keep any portion of the surface material of streets in repair, as required under the provisions of the location set out in the pleadings, were not unconstitutional as being an impairment of the obligations of contracts under subdivision 1, s. 10, Art. 1, Constitution of the United States.

5. The court erred in deciding that the provisions of c. 578, Massachusetts Laws of 1898, relieving the defendant in error from all obligation to keep any portion of the surface material of the streets in repair, as it was required to do under the locations set out in the pleadings, were not unconstitutional under the Fourteenth Amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

In order to determine the questions raised by these assignments of error, a frequent reference to certain sections of the Street Railway Law of Massachusetts as it was at the time of the granting of extensions of locations in question, and as modified by the provisions of said c. 578, Massachusetts Laws of 1898, may be necessary, and for convenience, the sections which are regarded by the plaintiff in error as material to the inquiry are here printed. The italics are not in the statute but are used to direct attention to those clauses which the plaintiff in error regards as especially significant.

Sections from c. 113 of the Massachusetts Public Statutes in force at the time the extensions of locations referred to in the Record were applied for and granted.

> "Sect. 7. The board of aldermen of a city or the selectmen of a town, upon the petition of such directors or a majority thereof for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers or otherwise as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location, and after a hearing they shall pass an order refusing such location, or granting the same or any portion *thereof under such restrictions as they deem the interests of the public may require;* and the

location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof."

"Sect. 21. The board of aldermen or the selectmen may, from time to time, *under such restrictions as they deem the interests of the public may require*, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise."

"Sect. 32. Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks."

Sect. 43 authorizes the directors of railway companies to establish rates of fares and Sect. 44 authorizes an

application under certain conditions to the Board of Railroad Commissioners for a revision and regulation of fares. Then follows Sect. 45:

> "Sect. 45. Nothing contained in the two preceding sections shall be held to authorize a company or said board to raise the rate of fare or the price of tickets above the rate or price established for a locality by agreement made as a condition of location or otherwise between a company or its directors and the mayor and aldermen of a city or the selectmen of a town, except by a mutual arrangement with such mayor and aldermen or selectmen."

The material portions of c. 578, Massachusetts Laws of 1898 are as follows:—

> Section 1. * * "'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain and operate a street railway in a public highway or street in such city or town. And 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

Sects. 2 to 5, both inclusive, relate solely to taxation.

Sect. 6 requires a return to the assessors of each town and city of the length of track operated by it and its gross receipts.

Sect. 7 is as follows:—

> "Section 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein, an excise tax of an amount equal to such proportion of the following percentages of the gross receipts of such company as the length of tracks operated by it in public ways

of such city or town bears to the total length of tracks operated by it in public ways, to wit:—

"In case of companies whose annual gross receipts per mile of track operated are four thousand dollars or less, one per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than four thousand dollars and less than seven thousand dollars, two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The excise tax provided by this section shall be in addition to the taxes now provided by law."

Sect. 8 is as follows:—

"Section 8. At any time after the end of three years from the first day of October, in the year eighteen hundred and ninety-eight the selectmen of any town, or the aldermen of any city, or any street railway company operating in such town or city, may petition the board of railroad commissioners for a revision of the amount of the excise tax to be thereafter paid by said company under the preceding section; and said board shall thereupon proceed to investigate and determine, after

public notice, and a hearing at which said selectmen or aldermen and said company may submit such evidence as may be pertinent, the average annual cost to said town or city of the work done by it during the preceeding three years under the provisions of this act which by law it was not previously required to do, and also the average annual payments made by said company to said town or city under and pursuant to said section during said three years; and having ascertained and determined said average annual cost and average annual payments, said board shall thereupon determine and fix the proportion of the percentage of the gross receipts which shall be paid as an excise tax under said section by the company to said town or city annually thereafter, said proportion to be fixed at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act and which it was not by law previously required to do, as determined as aforesaid; and the proportion of the percentage so fixed shall not be again changed for the period of three years, and not, except in the manner herein provided. Said board may at any time upon petition therefor by any city or town entitled to any part of the excise tax paid by any street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company under the provision of this act, instead of the proportion based upon length of tracks as hereinbefore provided."

Sects. 9 and 10 relate to the collection and use of this excise tax.

Sect. 11 is as follows:—

"Section 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, *but they shall remain subject to all legal obligations imposed in original grants of locations*, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor." * * * * * *

Sect. 12 relates to the clearing of snow from tracks and sect. 13, after providing for petition and notice upon the same for original location, continues :

Section 13. * * * * "In granting said location they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose *such other terms, conditions and obligations in addition to* those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location. * * * (Provisions as to protest of abutters and construction). * * * * * * "*All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of*

this section, and shall continue in force, subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act."

Sect. 14 relates to procedure in case of failure to obtain original location connecting two cities or towns.

"Section 15. The board of aldermen of a city or the selectmen of a town, upon the petition of fifty legal voters or the board of directors of a street railway company whose tracks are located in said city or town, and after notice and hearing as provided in section thirteen of this act, may grant a location for the extension of the tracks of such company and prescribe the manner in which said tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used; but they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of this act, or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage hereof. The provisions of section thirteen of this act as to acceptance, and as to protest of abutters and approval by the board of railroad commissioners, shall apply to grants of extensions under this section."

Sect. 16 relates to alteration of location.

Sect. 26 repeals sects. 7, 21, 23, 27, 32, 44 and 45 of c. 113, Public Statutes of Massachusetts.

ARGUMENT.

The questions to be considered in cases of this nature and the order of their discussion pointed out in St. Paul Gas Light Company vs. City of St. Paul, 181 U. S. 142, at page 147, will be followed in this argument as nearly as possible and are as follows, viz.:

I. WAS THERE A CONTRACT?

II. IF YES, WHAT OBLIGATIONS AROSE FROM IT?

III. IS THERE PROPERTY OR A PROPERTY RIGHT WHICH HAS BEEN TAKEN AWAY WITHOUT DUE PROCESS OF LAW?

IV. HAS THERE BEEN STATE LEGISLATION IMPAIRING THE CONTRACT OBLIGATIONS?

V. WHAT IS THE PROPER FORM OF REMEDY?

I

WAS THERE A CONTRACT?

To put the question in other phrase, it is: Whether the conditions inserted in the locations referred to in the pleadings of the plaintiff in error, given to the defendant in error, when accepted by the defendant in error in writing by an acceptance filed with the City Clerk of the City of Worcester, constituted contracts within the meaning of that word in Section 10, Art. 1, of the Federal Constitution?

The discussion of this question resolves itself into the subsidiary inquiries:

1. Were the conditions contained in the grants of extensions of locations to the defendant in error fairly comprehended within "restrictions" as used in the statute and therefore legally imposed under the law in force when the locations were granted?

2. Were the city and street railway company by implication and outside the express terms of the statutes empowered to enter into such contracts? and

3. Did the acceptance of this location, with such conditions, constitute a contract between the plaintiff in error and the defendant in error.

1

Were the conditions contained in the grants of extensions of locations to the defendant in error, fairly comprehended within "restrictions" as used in the statute and therefore legally imposed under the laws in force when the locations were granted?

This subject is not discussed in the opinion of the Supreme Judicial Court in these cases, nor is there any other decision of the Massachusetts court specifically determining it.

Section 21 of Chapter 113 of the Massachusetts Public Statutes under which the extensions of locations were granted, provided that "the Board of Aldermen . . . may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees or assigns, to extend the location of its tracks within their city . . ."

It is contended in behalf of the plaintiff in error that the paragraphs relating to maintenance of paving are technical restrictions, as that word is used in said section 21.

A

As to abstract definitions of restrictions.

"Restriction" is in its abstract signification a broader and more comprehensive word than is "condition." While "condition" may be more emphatic in the

narrow field that it comprehends, it is not so broad and inclusive as the word "restriction".

National Life Association v. Berkeley, 97 Va. 571.

Even in the technical signification of the words as applied to conveyances of real estate, the words "restrictions" and "stipulations" are analagous to "conditions.'

Smith vs. Bradley, 154 Mass. 227.
Hamlen vs. Werner, 144 Mass. 399.
Bagnall vs. Davies, 140 Mass. 78.
Beals vs. Case, 138 Mass. 140.
Tobey vs. Moore, 130 Mass. 448.
Peck vs. Conway, 119 Mass. 548.
Linzee vs. Mixer, 101 Mass. 512.

In conveyances also the word "condition" is defined as a "restriction" and vice versa.

LaBerree vs. Carlton, 53 Maine 211–213.
Cooper vs. Green, et al. 28 Ark. 48, at 54.

"A condition is a qualification or restriction."

Heaston vs. Randolph County Commrs. 20 Ind. 398-403.
Johnson vs. Gurley, 52 Texas 222-226.
Thornton vs. Trammell, 39 Ga. 202-207.
Langley vs. Ross, 55 Mich. 163.
Blanchard vs. Detroit etc Co., 31 Mich. 43.
Detroit Union R'way vs. Fort St. Co., 128 Mich. 184.
Warner vs. Bennett, 31 Ct. 468.

It has been held that the words "conditions" and "restrictions" in an authority to grant permission to lay railroad tracks import simply a qualification or limitation of the gift to which they are annexed.

North Hudson Co. vs. City of Hoboken, 41 N. J. Law 71-76.

Condition is defined as "a restriction placed upon the use of a thing."

Anderson's Law Dictionary.

Condition is defined by Bouvier to be "a qualification, restriction or limitation, modifying or destroying the original act with which it is connected."

The language of the Supreme Judicial Court of Massachusetts in construing the word "condition" in a deed, in Ayling v. Kramer, 133 Mass. 12 at page 13, is especially appropriate. "We are of opinion that the so called conditions in the deed to Carter were not intended or understood by the parties to be technical conditions, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land, and are to be construed as restrictions."

Episcopal City Mission v. Appleton, 117 Mass. 326.

Skinner v. Shepard, 130 Mass. 180.

B

Specific decisions and arguments therefrom.

In Newcomb vs. Norfolk Western Street Railway Co., 179 Mass. 449, it was held that

> "the requirement in § 23 of the grant of the location to the respondent that it shall water the street over a portion of the way between certain dates was a lawful restriction within Pub. Sts. c. 113, § 7, which allowed selectmen to grant a location 'under such restrictions as they deem the interests of the public may require.' The well known effect of running cars is to raise a dust, and the requirement, although affirmative in form, in substance restricts the respondent to running cars in such a way as not to raise a dust."

The descriptive word used in the grant of extension by the public officers of the city of Worcester, whether "restrictions" or "conditions," is of slight significance; the real question to be determined upon this branch of the case is whether in essence the paragraphs which the Board of Aldermen of Worcester inserted in the grants of extensions of location to the defendant in error were in legal intendment restrictions or not. Or, in other words, whether they are similar to the street watering clause which the Supreme Judicial Court of Massachusetts in Newcomb vs. Norfolk Western St. Ry. Co. termed "requirements," and therefore properly comprehensible within the word "restrictions," or whether they were something outside of it.

It is as much, and no more, a restriction upon the right of the defendant in error to use the streets of Worcester for operating a street railway, to require it to keep the paving over the entire length of the street in proper repair, than it is to require it to water the street in which the tracks may be located, from curb to curb.

The requirement of maintenance and repair of paving is a limitation or abridgement upon the right of the defendant in error to use the streets for the purpose of street railway traffic.

The requirement to water the street from curb to curb, although affirmative in form, and continuous from year to year in substance, was sustained as a lawful restriction upon the company so to run its cars as not to raise dust. At least, with equal force it may be argued that a restriction requiring the maintenance of block paving between the rails and for a space of 18 inches outside in some streets, and from curb to curb in others, was in fact a requirement that the railway company so construct and maintain its tracks as not to injure the street and make it as a whole unduly injurious and dangerous to other travel. It is common

knowledge that if a street in which street railway tracks are laid has a perceptible grade, it is practically impossible to keep the surface of the street between and about the rails in such repair as to be safe and convenient for travel, or for use for railway purposes, unless some kind of pavement is laid. It is also a matter of common observation that the use of that portion of the streets, in which street railway tracks are laid in populous cities, is to a great degree practically prohibitive of travel by general teaming over that portion of the street, which necessarily brings upon the portions of the street outside the tracks very great increase of use and wear beyond what would exist if no tracks were in the street.

The word "restrictions" itself imports that the thing referred to shall be permitted to be exercised only in a modified form, and not absolutely or unqualifiedly.

C

As to contemporaneous construction of meaning of restrictions.

"A contemporaneous is generally the best construction of a statute. It gives a sense of a community, of the terms made use of by the Legislature."

Packard v. Richardson; 17 Mass. 122, at 144.

It appears from the report of the special committee appointed to investigate the relations between cities and towns and street railway companies, under the authority of Chapter 509 of the Mass. Laws of 1897, being House Document No. 475 of the Laws of 1898, on pages 22 and 23, that it has been the generally accepted view that "restrictions" has had in practice a very broad meaning.

> "The Committee is aware that different views exist on the meaning of the present law. By some

it is held that the "restrictions" of street railway locations in the several statutes relating thereto are limited, and that any additional terms exacted or conceded are, in legal phraseology, *ultra vires*, and cannot be enforced in law. This, however, is not the view usually taken, and, confessedly, the practice has been and now is widely at variance with it.* Such a literal construction of the statute, if sound in law, would result in a noticeable breach in that principle of local self-government which is the basis of the Massachusetts polity. It would, indeed, carry the principle of centralized State control in this matter far beyond the point even, to which it is carried in the countries of continental Europe.

In the view of the Committee, however, the present Massachusetts system, while somewhat undefined and even contradictory in character,— as is not infrequently the case with a system built up by degrees as the work of a succession of legislative bodies,— tends to treat this whole matter of street railways as one of local concernment. It is regarded as simply a question of the use which a given municipality sees fit to make of its thoroughfares. The municipalities are held to be the best, and, indeed, within broad limits, the only, judges of that use; just as the railway corporations are the best, and again the only, judges as to the degree of protection afforded by the grants they accept. If municipalities or corporations choose, from overeagerness or for other reasons, to enter into ill-advised or improvident agreements, which they afterwards repent, that is their affair; and the

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[* "The law is very simple upon this point. It says that locations may be granted with such restrictions as in the judgment of the selectmen or the aldermen the public interests may require. But these local officials have in practice enlarged the word 'restrictions' so that it is made to include 'terms and conditions' also. To all practical intents and purposes the law might just as well read that locations shall be granted upon such 'terms, conditions, provisions and agreements' as the selectmen may in any case decide." (Argument of E. W. Burdett, counsel for the Massachusetts Street Railway Association, before the Committee, page 103.)]

officials entering into such agreements are responsible to their constituencies, whether the body of citizens or the holders of the company's stock. It certainly is not the part of the Commonwealth either to prescribe the terms of grants, or, after they are made, to examine those terms with a view to seeing that they contain nothing of which the parties to them may thereafter repent. In this view of the matter, it would seem, on the one hand, that improvident concessions of an apparently perpetual character may have been, perhaps were, made by the agents of the municipalities, and valuable privileges were conferred, not coupled with corresponding obligations. On the other hand, in their eagerness to secure these valuable concessions and privileges, the corporations may have seen fit to regard the reservation which accompanied them as a mere matter of form. Under the system in use in Massachusetts, it was, as it now is, in the power, as it was and is the duty, of those representing both municipalities and companies to insist on more specific and better-considered grants, covering, if thought best, a given term of years, and binding in law during that term."

2.

Were the city and street railway company by implication and outside the express terms of the statute empowered to enter into such contracts relative to paving?

It is clear that the subject matter, namely, the repair of streets, was one about which the city had a right to contract.

As a preliminary observation, it is important to bear in mind throughout this branch of the discussion that, under the Massachusetts law, a municipality may lawfully make a contract to relieve itself from the expense of keeping a public way in repair for all time. Such

a contract was before the court in Brookfield vs. Reed, 152 Mass. 568, where the court says at page 573 —

> "It is objected that the contract is illegal, because by it the town has deprived itself of the control and regulation of the way. But it cannot have that effect. The contract provided a mode in which the town might perform its duty to keep a public way in repair. It did not obviate that duty, or relieve the town from liability for want of repair in the way. It cannot prevent the lawful discontinuance of the way, and it will not be construed as intending to do that. The subject matter is a public way, and if that should cease to exist, the obligation of the town to maintain the way and the bridge, and the obligation of the defendants to keep the way in repair, would cease. . . . . We have no doubt that the plaintiff could lawfully receive from individuals an obligation to relieve it from the expense of keeping a piece of public way in repair for all time. Hawks vs. Charlemont, 107 Mass. 414. Arlington vs. Cutter, 114 Mass. 344, and cases cited. Deane vs. Randolph, 132 Mass. 475. Sullivan vs. Holyoke, 136 Mass. 272. Waldron vs. Haverhill, 143 Mass. 582."

See to the same point:

Springfield vs. Harris, 107 Mass. 532.
Melrose vs. Hiland, 163 Mass. 303-311.
Atkinson vs. Newton, 169 Mass. 240.
Bell vs. Newton, 183 Mass. 481.

So far as the City of Worcester is concerned, it must be taken as established by the foregoing authorities that it had a right to contract with reference to the repair of its streets, unless there is some inhibition expressly contained in or fairly to be implied from the statutes governing the relations between the municipality and the street railway company, and unless there is something in the law rendering such contracts outside the power of the street railway company.

A

Worcester Gas Light Co. vs. Worcester, 110 Mass., 353.

The Supreme Judicial Court of Massachusetts has clearly recognized the correctness of the principle for which the plaintiff in error contends in Worcester Gas Light Company vs. Worcester, 110 Mass. 353. But for the decision in the cases at bar that case would be conceded to establish the plenary authority of the municipality to contract with reference to constructions interfering with the surface of the streets. The case related to the authority of the local authorities of the City of Worcester to make a contract with reference to the laying of gas pipes in the streets of the City of Worcester. In 1849, a voluntary unincorporated association was formed by certain citizens of Worcester, for the purpose of supplying gas, which made application for leave to lay pipes in the streets and to erect gas works. Thereupon, an order was passed by the City Council on May 3, 1849, designating certain streets in which the association might lay pipes and containing further provisions with reference to the price at which gas should be furnished both to citizens and to the city. At this time there was no general law or special act authorizing the laying of gas pipes in streets.

In 1851, the associates, who had laid down the pipes and accepted the order, became incorporated as the Worcester Gas Light Company, under c. 159, Laws of 1851, and by vote assumed the liabilities imposed by the original order of the city council upon the associates. S. 4 of said c. 159 authorized the corporation "with the consent of the mayor and aldermen of the City of Worcester" to open ground in the streets and highways of the city for the purpose of sinking and

repairing pipes. There was no general law authorizing the laying of gas pipes at this time, the first statute in relation to gas light companies and their authority to open streets being c. 146, Laws of 1855, The corporation which succeeded to the original associates refused to carry out the contract as to the price of gas, and sued the city to recover its own price. Counsel of international distinction argued the case for the Gas Co. Yet the Supreme Judicial Court of Massachusetts in 110 Mass. at p. 355 held that "the order of the city council passed May 3, 1849, having been accepted and acted upon by the original proprietors of the Worcester Gas Light Company, created a *contract* between the company and the city. The act of incorporation of the plaintiffs provides that the corporation 'shall assume all the liabilities of the present proprietors of the gas light works in Worcester, in relation to the making and selling of gas.' St. 1851, c. 159, s. 5. By accepting this act the plaintiffs therefore assumed and came under the liability, as to furnishing gas to the city, created by this contract."

There can be no distinction between an authority on the part of the city to contract with reference to the digging in a street for the purpose of laying gas pipes and its authority to deal by contract with a street railway company for the purpose of laying tracks upon or near the surface of the street. The principle governing the two situations must be the same.

B

Argument for competency of parties to make contract from Mass. statutes.

This question can be most intelligently discussed by a survey of the history of street railway legislation in Massachusetts. The first general law applicable to street railway companies was passed in 1864. No law

was passed authorizing the incorporation of street railway companies by any general statutory provision, until 1874. Prior to that time, all street railway corporations were created by special act of the Legislature, the first having been passed in 1853. Between that time and 1871, more than seventy special acts of incorporation were passed. A schedule of these statutes is printed as "Appendix C" in this brief. They are all framed upon two general types, with such modifications as the special requirements of any particular municipality may have rendered wise.

The statute creating the Worcester Horse Railroad Company, which is c. 148, Mass. Laws of 1861, (to whose rights, franchise, liabilities and obligations the defendant in error has succeeded by c. 141, Mass. Laws of 1867, c. 356, Mass. Laws of 1869, and c. 284, Mass. Laws of 1887,) is printed as "Appendix A" to this brief, and is a fair type of the provisions contained in the earlier statutes. The other type of statutes is fairly illustrated by c. 181, Mass. Laws of 1866 incorporating the Cohasset & Scituate Street Railway Co. printed as Appendix B. An examination of the provisions and a careful search through all the special acts referred to in "Appendix C" fails to show any special or express authority on the part of the municipality or the company to contract with each other as to repair of streets, or with reference to any other subject matter except the purchase of the company by the municipality. At least thirty-seven of these statutes contain sections authorizing such a purchase, which sections are referred to in said "Appendix C", and which authorization is in section 12 of the statute printed in "Appendix A." The power conferred upon the municipal authorities in section 1 of the act (c. 148, Mass. Laws of 1861) is to fix or designate the streets and portions of streets in which the tracks may be constructed. Section 9

gives the mayor and aldermen authority to change the grade of the streets in which tracks may be constructed, and the grade at which they shall be laid. There is no where else in the statute any express enactment corcerning a power to contract, nor is any such authority to be found in any of the acts printed in schedule "C". But it is a matter of common knowledge that such conditions were constantly inserted in locations. The printed volume of street railway locations granted for street railways in the city of Boston, prior to November 1, 1894, shows many conditions as to paving and use and repair of streets inserted in locations.

In view of this situation, the Legislature came to the enactment of its first general law respecting this class of corporations, which was chapter 229 of the laws of 1864, and was entitled "An Act Concerning Street Railway Corporations."

Section 12 of this act recognized the intimacy of relation between the company and the municipality by the requirement that the act of incorporation should be accepted by the city council of the city or the selectmen of the town within one year after any act of incorporation should be passed.

Section 14 of this act contains the first legislative use of the word "restrictions", which is as follows:—

> "Section 14. The board of aldermen of any city, or the selectmen of any town, in which any corporation is authorized to construct a street railway, may, upon the petition of such corporation, locate the tracks thereof within their respective jurisdiction, pursuant to the provisions of its charter: provided, that before proceeding to locate such tracks, they shall give notice to all parties interested, by publication in such newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at

which they will consider such location. After a hearing of all parties interested, they shall pass an order refusing the location, or granting the same, or any portion thereof, *under such restrictions as they deem the interests of the public may require*, and the *location thus granted* shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof, in writing, is filed with said *mayor and aldermen or selectmen within thirty days* after receiving notice thereof. The location and position of any tracks may be altered upon application of any party interested, by the same authority, and in the same manner, as is herein provided for the original location. The expense of such alteration shall be borne by such party as the board of aldermen or selectmen may determine."

Yet, alongside of this section in the same act, the Legislature not only recognized the pre-existing authority of municipalities and street railway companies to contract, but expressly preserved the obligation of all such contracts in section 45, which is as follows:—

"Section 45. All acts and parts of acts inconsistent herewith are hereby repealed. But nothing in this act contained shall operate to annul or impair in any wise any terms or conditions upon which any charter has been accepted, or location or other privilege granted by any city or town, and which have been assented to by such corporation."

In 1866, two further acts were passed, general in their nature, relating to corporations of this class. Chap. 286 of the Mass. Laws of 1866, contained a general enactment that all street railway companies should maintain and keep in repair such portions of the streets as were occupied by its tracks, and three feet on each side thereof. Section 2 of said act, not

only recognized the validity, but preserved the obligation, of contracts and agreements entered into between the municipality and the corporation in this language:—

> "Section 2. The liability created by this act shall be held to be in lieu of, and a substitute for, all liability now existing in regard to paving by any horse railroad company under *any location or contract,* with any city or town, provided that this act shall not take effect in any city or town where any liability to pave is imposed by any location given, until it has been accepted by such city or town."

Chapter 294 of the Massachusetts Laws of the same year also recognize the right of the corporations and the municipalities to contract, in this language:—

> "Section 1. The supreme judicial court, or any justice thereof, may, upon the petition of the mayor and aldermen of any city, or the selectmen of any town in which any horse railroad is located, issue any injunction or other order upon any horse railroad corporation, or its agents, after having first notified such corporation of the application, and a hearing had thereon, for the purpose of enforcing any laws, lawful rules, regulations, orders or ordinances, relative to such corporation, in a summary manner, and according to the usual course of chancery proceedings: provided, that nothing herein shall abridge or limit the powers now held in relation to such corporations by the municipal authorities of any city or town, nor affect *any contracts or agreements* now existing."

In 1871, the law concerning street railways was codified by chapter 381 of the laws of that year.

Again the Legislature recognized the right to contract with street railway companies by inserting conditions in locations, but here as to a new subject-matter, namely, the rate of fares. For purposes of comparison, ss. 14 and 35 of this Act are printed side by side.

"Sec. 14. The Board of Aldermen of any city, or the Selectmen of any town, in which any corporation is authorized to construct a street railway, may, upon the petition of such corporation, locate the tracks thereof within their respective jurisdictions, pursuant to the provisions of its charter: *provided* that before proceeding to locate such tracks, they shall give notice to all parties interested, by publication in such newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location. After a hearing of all parties interested, they shall pass an order refusing the location or granting the same, or any portion thereof, *under such restrictions as they deem the interests of the public may require*, and the location thus granted shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof in writing is filed with said Mayor and Aldermen or Selectmen within thirty days after receiving notice thereof."

Secs. 33 and 34 relate to the establishment of rate of fare by the Directors of the company and by the Railroad Commissioners.

"Sec. 35. Nothing contained in the two preceding sections shall be held to authorize any corporation or said commissioners to raise the rate of fare, or the price of tickets, above what has been heretofore established as such rate or price for any locality, *by agreement* made as a *condition* of *location* or otherwise between a corporation or its directors, and the Mayor and Aldermen of any city or the Selectmen of any town, except by a mutual arrangement with the Mayor and Aldermen or Selectmen with whom such agreement was made."

The law respecting street railways was again codified by chap. 113 of the Massachusetts Public Statutes and once more the Legislature recognizes the validity of agreements and conditions respecting locations in the very act in which they use the word "restrictions." Ss. 7 and 21 which use the word "restrictions" are printed in parallel columns with ss. 43, 44 and 45, which recognize agreements and conditions in locations.

"Sec. 7. The Board of Aldermen of a city or the Selectmen of a town, upon the petition of such directors or a majority thereof for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers or otherwise as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location and after a hearing they shall pass an order refusing such location, or granting the same or any portion thereof under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said Mayor and Aldermen or Selectmen within thirty days after receiving notice thereof."

"Sec. 21. The Board of Aldermen or the Selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the Board of Aldermen or selectmen may determine, or otherwise."

"Sec. 43. Every street railway company shall furnish reasonable accommodations for the conveyance of passengers, and for every wilful neglect to provide the same shall forfeit not less than five nor more than twenty dollars; and its directors may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject, however, to the limitations named in its charter, or hereinafter set forth."

"Sec. 44. The Board of Aldermen of a city, the Selectmen of a town, or fifty legal voters of a city or town in which a street railway is located may apply to the Board of Railroad Commissioners, who shall, after due notice and hearing of the parties interested, revise and regulate the fares established by such company; but such fares shall not, without the consent of the company, be so reduced as to yield, with all other profits derived from operating its road, an income of less than ten per cent upon the actual cost of the construction of its road and the purchase of property for its necessary use, to be determined by said board. The report of the board shall be final and conclusive for one year."

"Sec. 45. Nothing contained in the two preceding sections shall be held to authorize a company or said board to raise the rate of fare or the price of tickets above the rate or price established for a locality *by agreement made as a condition of location* or otherwise between a company or its directors and the Mayor and Aldermen of a city or the Selectmen of a town, except by a mutual arrangement with such Mayor and Aldermen or Selectmen."

These successive legislative enactments make it apparent that the Legislature of Massachusetts did not intend to prohibit in grants of extensions of locations the insertion of provisions imposing upon street railway companies either the same obligations or others in addition to those imposed by the general law.

The first general codification of 1864 contains in the same statute, the words "restrictions","terms", and "conditions". The two general amendatory acts of 1866 contain the words "a location orcontract" and "contracts or agreements", and the general codification of 1871 repeats the words "restrictions," "agreements" and "conditions", and the same words are repeated in the Public Statutes of 1882.

As further confirmation of the argument that agreements, outside of what may be technically restrictions, were authorized by the Massachusetts Street Railway Statutes, s. 5, c. 284 of the Massachusetts Laws of 1887 establishing the name of the defendant in error is important, which provides as follows:—

> "Section 5. The said Worcester Consolidated Street Railway Company shall perform all the *stipulations* imposed on the said Citizens' Street Railway Company as a condition on which the location of said railway in the several streets of the city of Worcester was granted by the board of aldermen of said city, within the time as extended by the order of said board of aldermen. In case of the neglect or refusal of said company to perform the said *stipulations* the supreme judicial court or any justice thereof, upon petition of the board of aldermen of the city of Worcester, may by proper decree require said company to perform the same."

Section 11 of chapter 578 of the Laws of 1898 is another legislative confirmation of the validity of conditions theretofore inserted in the street railway locations.

The first clause of said section is as follows: "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in the original grants of locations." The word "obligations" by its minimum force imports at least a contractual relation. If the legislative interpretation of the word "restrictions" as used in sections 7 and 21 of chapter 113 of the Public Statutes had been as narrow and limited as is contended for by the defendants, the word "obligation" would not have been used in section 11 of the Laws of 1898.

The word "obligation" may have a much higher significance than a mere contractual relation.

Edwards vs. Kearzey, 96 U. S. 595.

The argument of legislative confirmation of the conditions is strengthened by the final sentence of section 13 of the Statutes of 1898, which provides that "all locations heretofore granted . . . are hereby ratified and confirmed, . . . and shall continue in force, subject . . . to all provisions, restrictions, regulations or conditions applying to all street railways under the general law as now enforced, except as changed or modified by this act." If the conditions could not legally be annexed to locations, under chapter 113, there would have been no occasion for the use of the word "conditions" in this sentence.

But two conclusions can be drawn from this continuous and oft repeated use of these words by the Legislature of Massachusetts, either.

(1). That the Legislature regarded the word "restrictions" as comprehending "terms", "conditions", "obligations," "agreements," and "contracts," or,

(2). That it recognized the right of the municipality and the street railway company to enter into con-

tracts and agreements and impose valid conditions in locations respecting all subject matters relating to the construction, maintenance and operation of the street railway company.

The conclusion that the Legislature intended to recognize the right of and authorize the municipality and the street railway company to enter into contracts and agreements, and of the former to impose valid conditions in locations respecting all subject matters relating to the construction, maintenance, and operation of the street railway company is more reasonable and consonant with the meaning of words which were used by the Legislature in these several statutes. It perhaps would not be justifiable to assume that the Legislature intended "restrictions", "terms", "conditions", "contracts", "agreements", or "stipulations" to be used as synonymous terms, when full force and effect can be given to the language by interpreting the words as being used in their ordinary signification.

It is therefore submitted that the Street Railway Law of Massachusetts, at the time the locations in question were granted, authorized contracts between the municipality and the street railway company respecting the general subject matter of street paving. There is not only no prohibition of the making of such contracts to be found in the statutes but on the contrary abundant legislative recognition of such right.

This conclusion receives ample support, with no dissenting note, so far as we have been able to discover, from the decisions of all other courts.

B.

Argument from decisions of other courts.

If from said Section 21, Chapter 113, Massachusetts Public Statutes had been entirely omitted the clause "under such restrictions as they deem the interests of

the public may require," and it had read simply " the board of aldermen may authorize," it is clear under the rule laid down in many cases, that the municipal board might have granted its authority upon such terms, stipulations, restrictions, limitations and conditions as it deemed advisable, to the extent of requiring the performance of such active duties as in its opinion public interests require.

People vs. Barnard, 110 N. Y. 548.

N. Y. & Harlem R. R. Co. vs. City of N. Y., 1 Hilton, 562.

Western Paving & Supply Co. vs. Citizens' R. R. Co. 128 Ind. 525-530.

State vs. Madison St. Ry. Co., 72 Wis. 612.

City of Troy vs. Troy & Lansingburgh R. R. Co., 49 N. Y. 657.

Alleghany vs. Millville etc. St. Ry. Co., 159 Pa. St. 411.

N. Y. & N. H. R. R. Co. vs. N. Y., 4 Beatchford 193.

Citizens St. Ry. Co. vs. City Ry. Co., 64 Fed. Rep. 647.

Detroit vs. Detroit Cy. Co., 37 Mich. 558.

The power to " assent " to the construction of a railroad necessarily involves the right of prescribing terms and conditions under which the authority is to be given.

Northern C. R. Co. vs. Baltimore, 21 Md. 93.

If the legislature had intended to grant to the municipal authorities only the limited power contended for by the defendant in error, it would have been easy to express such limitations clearly and unmistakably, but a grant of location by a municipality is to be strictly construed against the railway company, and such company can claim no doubtful rights under such grants. Wherever doubts exist, they are to be resolved against the grantee, and in favor of the city.

Western Paving & Supply Co. vs. Citizens R. R. Co., 128 Ind. 525-529.

Citizens R. R. Co. vs. Jones, 34 Fed. Rep. 579.

Mayor of Alleghany vs. Ohio R. R. Co., 29 Pa. St. 385.

Birmingham etc., R. R. Co. vs. Birmingham, 79 Ala. 465.

By Section 9, Article 17 of the Constitution (of the State of Pennsylvania) "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities."

It was held that a municipality in granting such consent might impose any reasonable conditions under which the right was to be enjoyed.

Alleghany vs. Millville etc. St. Ry. Co., 159 Pa. St. 411.

Plymouth vs. Chestnut Hill & Norristown Ry. 168 Pa. St. 181.

In Philadelphia vs. Ridge Ave. Passenger R. R. Co., 143 Pa. St. 444, it appeared that the grant of location to the railway company provided that the entire cost and expense of maintaining, paving, repairing and repaving that might be necessary upon any street occupied by the company should be borne by the company. With reference to the validity of this clause under the same constitutional provision above suggested, the court, at Page 466, says "The city had a right to impose that condition upon the corporation before it entered upon the streets and laid its tracks upon them. The act of assembly made the consent of the city to the exercise of that power by the company a prerequisite to the right to use the streets of the city for the purpose of constructing upon them, the streets defined in the act, a city passenger railway, and if the

ctiy had a right to refuse or consent, it had a right to say upon what terms it would consent and upon what terms it would refuse."

A statute of Kansas provided that no street railway should be authorized to construct its road upon any street "without the assent of the proper authorities of such city."

Judge Dillon in giving an opinion construing the effect of these words in

Pacific Railroad Co. vs. Leavenworth, I. Dillon, Circuit Court, 393,

says on page 398 "It has been argued in behalf of the complainant that this statute simply clothes the city with the power to say "yea" or "nay," but that it does not authorize it to stipulate for terms or conditions. But in this view, I cannot concur. Its power is complete; and it was undoubtedly the desire of the legislature that the city authorities, as the representatives and guardians of the public interests of the city and its inhabitants, should have the power to prescribe, as conditions of giving their assent, such lawful and proper terms as they deemed expedient."

A statute of Maryland required that before a railway should be constructed in the streets of Baltimore "the assent of the Mayor and City Council should first be obtained." In commenting upon these words, in Northern Central Railway Company vs. Baltimore, 21 Md. 93, at page 104 the Supreme Court of that state says, "Nothing can be clearer than in such a case the power reserved by the Act to the Mayor and City Council upon the subject is complete and unimpaired and necessarily involves the right of prescribing the terms and conditions upon which their assent is given."

A statute of Georgia required the "consent" of the authorities of the city to the coustruction of a railway

in the streets. It was held in Powell vs. Macon & Newton Springs Railroad Company, 92 Ga. 209, that such consent might properly be accompanied with a condition. See also Detroit vs. Detroit City Railway Company, 37 Michigan 558.

Power to give consent to the building of a street railway has been held impliedly to carry with it power to impose conditions, although no such power is expressly stated in the legislative Act.

See in addition to cases above cited,

Peoples West Side St. Ry. Co. vs. Barnard, 110 N. Y. 548.

Archibald vs. Carbondale Traction Co., 3 Pa. Dist. R. 751.

Abraham vs. Myers, 29 Abbott M. C. 384.

So also the power to assent has been held to confer the power to impose conditions.

Pittsburg etc. Co. vs. Birmingham, 51 Pa. St. 41.

See also

Houston vs. Houston Belt Co., 84 Texas 585.

St. Joseph County Commrs. vs. South Bend etc. Co., 118 Ind. 68.

Kinsman St. Ry. Co. vs. Broadway etc. Co., 36 O. St. 239.

Chicago etc. Co. vs. Dunbar, 100 Ill. 110.

Markey vs. Brooklyn, 35 N. Y. 49.

St. Louis Co. vs. Capps, 72 Ill. 188.

Chicago vs. Chicago etc. Co., 105 Ill. 73.

The defendant in error was granted an extraordinary and a practically exclusive privilege to run cars in the streets described in the extensions of locations. It had no rights in the streets whatever until the local authorities had granted it the location. It has been held that such a privilege may be granted by the municipality upon a payment or bonus for the privilege.

In Newport vs. South Covington & Cincinnati Street Railway Co., 89 Ky. 29, under a statute which provided that the board of councilmen of the city "shall prescribe by ordinance the terms and conditions upon which the public ways of said city may be used or occupied by street railroads," (Sec. 16, c. 306, Acts of Ky. for 1874,) the Supreme Court of Kentucky held that the exaction of a cash payment per car as consideration for permitting the railway to operate, was legal, saying at pp. 33 & 34:

> "The company had no right to enter upon the streets and operate its road save under the franchise granted it by the city. Its consent was necessary, in the absence of express authority from the legislature. The municipality said you may do so, but only upon condition that you pay so much for the privilege."

This decision is in accordance with the tendency of the Supreme Judicial Court of Massachusetts in West Springfield and Agawam St. Ry. Co. vs. Bodurtha, 181 Mass., 586.

Louisville City Ry. Co. vs. Louisville, 4 Bush, 478.

We know of no case which decides or intimates that the condition or restrictions like those inserted in the grants of location at bar were not legal at the time inserted. The Supreme Judicial Court of Massachusetts, in deciding these cases (182 Mass. 49) specifically declined to express any opinion upon the subject. But confident reliance is placed upon Newcomb vs. Norfolk Western Street Railway Company, 179 Mass., 449, as well as upon the general discussion heretofore had that such conditions were valid as restrictions at the time of their grant.

The foregoing discussion has clearly established the two preliminary propositions—

First, that the parties to this suit were competent to make the contract alleged, and

Second, that the subject matter was a proper thing about which to contract.

It remains to inquire whether a contract was actually made, that is to say:

3.

Did the extension of location granted to the defendant in error, when accepted by its written acceptance filed with the City Clerk of the city of Worcester, constitute a contract?

The Supreme Judicial Court of Massachusetts, upon this subject, said simply, . . .

> "It seems to us that the locations, given to street railway companies in public streets by cities and towns in this Commonwealth, do not constitute contracts, or if they do, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provision."
>
> 182 Mass., 47-8.

The questions raised by the writs of error in these cases impose the duty upon this court, however, to ascertain "whether there was a contract, and its import. And this, though it be in a given case the state court has decided that there was no impairment either because the contract had never existed, or because from an interpretation of its provisions, it was found that the obligations which it is asserted were impaired never arose. Houston & T. C. R. Co. vs. Texas, 177 U. S. 66, 77."

> St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142-147.

In Deposit Bank of Frankfort vs. Frankfort, 191 U. S. 499, at p. 518, the court speaking through Mr. Justice Day quotes with approval the language of Mr. Justice Harlan, delivering the opinion in Douglass vs. Kentucky: 169 U. S. 488, 501, as follows:—

"This court must determine—indeed, it cannot, consistently with its duty, refuse to determine—upon its own responsibility, in each case as it arises whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile state legislation."

The whole matter, whether there is a contract or not, is opened anew for discussion here, and this court is in no wise bound by what the state court may have said upon the subject.

> "Where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."
>
> McGahey vs. Virginia, 135 U. S. 665-667.
> Douglas vs. Kentucky, 168 U. S. 488-501.
> McCullough vs. Virginia, 172 U. S. 102-110.

Four cases have recently been decided by this court, three of them being since the argument of the cases at bar in the Supreme Judicial Court of Massachusetts, which it is respectfully but strenuously contended sustain the proposition that the locations in question, when accepted, constituted contracts. These cases are Detroit v. Citizens Street Railway Company, 184 U. S. 368; Cleveland v. Cleveland City Railway Company, 194 U. S. 517; Cleveland v. Cleveland Electric Railway Company, 194 U. S. 538. City Railway Company v. Citizens St. R. R. Co. 166 U. S. 557.

For purposes of comparison we print in parallel columns the vital provisions of the Massachusetts statute under which the locations in the cases at bar were granted, and the statutes of Michigan, Ohio and Indiana under consideration in the four cases above cited.

Mass. *P.S. ch. 113, §21.*

The Board of Aldermen or the Selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof.

The Michigan Tramway Act of 1855, as amended by Acts of 1861-67, § 34, reads,

All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; provided further, that after such consent shall have been given and accepted by the company or corporations to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

Bates Annotated Statutes of Ohio. Revision of 1897.

Sec. 2501. (Terms and conditions of construction and operation to be fixed by council; renewal of grant). No corporation, individual or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; but the council may renew such grant at its expiration upon such conditions as may be considered conducive to the public interest.

* * * *

Sec. 3443. (Council, etc., may fix terms and conditions). Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such [street] railways may be constructed, operated, extended, and consolidated.

Indiana Stats. of 1861.

Sec. 12. "Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys, and bridges within the corporate limits of such cities; and all street-railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common council to the location, survey, and construction of any street railroad, through or across the public streets of any city before the construction of the same shall be commenced."

In Detroit vs. Detroit Citizens Street Railway Company, 184 U. S., 368, at pages 384-5, the court, speaking through Mr. Justice Peckham, respecting the force of the language of the Michigan statute above quoted, says:

> "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be creditable that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that by

> the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe, and efficient running of the cars, the character of service, the speed and number of cars, and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language."

The decision proceeds to a conclusion, however, by resting upon the terms of §§20-29 of the street railway act set out in the margin of said report, which were held to expressly authorize an agreement relating to a rate of fare.

If the provision in the Detroit ordinance had been that the street railway company should be required to pave that portion of streets between the tracks in which its tracks were laid, by parity of reasoning the court must have held this provision also to be a contract that the company should not in the future be required to pave a larger part of the street. Can it be any less a contract when the obligation is that it shall pave the entire street between the curbs? Is not the language of the court in the Detroit case equally apt when applied to a requirement made of and assumed by the street railway company for the benefit of the municipality?

Respecting the power of the municipal authorities of the city of Cleveland to impose a condition as to rates of fare under the provisions of the statutes quoted, this court, speaking through Mr. Justice White, says, in Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, on page 534:—

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms

and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

Then after referring to Cincinnati & S. R. Co. vs. Carthage, 36 Ohio St. 631, 634, and Columbus v. Columbus Street Ry. Co., 45 Ohio St. 98, as being decisions of the Ohio court that the grant created a binding contract, the court proceeds to consider the question upon principle apart from authority and without treating the Ohio decisions as decisive, and reaches the result, upon page 536, that, . . .

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. Rep. 531."

In City Railway Company v. Citizens' Street Railroad Company, 166 U. S. page 557, in passing upon an

ordinance granted under the above quoted §122, Indiana statute, granting the appellee a right to construct a street railway in certain streets in Indianapolis, the court speaking through Mr. Justice Brown, at page 563, says,—

> "That the complainant had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in Western Paving & S. Co. v. Citizens' Street R. Co., 128 Ind. 525 (10 L. R. A. 770), in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by §11 of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street-railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city."

The decisive words in the several statutes construed in these cases, action under all of which has been uniformly held to constitute contracts are, if anything, less comprehensive in their grants of power to the municipal authorities than is the Massachusetts Statute. The Massachusetts Statute "authorizes" street railway construction under "restrictions" and requires "acceptance" by the company. The Michigan Statute requires "consent" under "regulation" and "upon terms and conditions." The Ohio Statute requires a "grant of permission" and the prescribing "of terms and conditions." The Indiana Statute requires "consent."

It is to be observed that the Massachusetts Statute is the only one which requires an acceptance on the part of the company, which acceptance is to be filed with the City Clerk.

The construction contended for by the defendant in error requires this Court to determine that instrument to

be not a contract in Massachusetts, which it has held in the three States above mentioned to be contracts, and this with reference to a subject-matter where the jurisdiction of this Court is original, to determine whether a contract exists or not, quite unfettered by any decision of any of the State Courts.

The petitions of the defendant in error for the extensions of locations, in which so-called conditions appear, were voluntary petitions. There was no compulsion resting upon the defendant in error to accept locations, and there was no provision of law compelling extensions. The granting of the extension of location to the defendant in error by the local authorities of Worcester, was wholly discretionary and optional. The act of the defendant in error, therefore, was entirely voluntary, and any agreement or condition made or accepted by the defendant in error, it should be held to perform.

West Springfield & Agawam St. Ry. Co. vs. Bodurtha: 181 Mass. 583.

A

The right to contract as to laying out highways recognized.

The statutes of Massachusetts authorize the laying-out and widening of highways, only on the ground that "common convenience and necessity requires" it. As preliminary to the right of the public ways, there must be an adjudication that such action is required by "common convenience and necessity," and until the public board acting judicially makes this preliminary adjudication, there can be no legal lay-out.

Mass. Rev. Laws, c. 48, ss. 1 and 5.

No right exists on the part of public officers to lay out ways "colorably for the use of the inhabitants, but really for the benefit of private land owners," "over lands of others who are opposed to the way."

Commonwealth vs. Cambridge: 7 Mass. 156, 167.

Yet it has been repeatedly held by the Supreme Judicial Court of Massachusetts that valid agreements might be made with the board laying out the way, such agreements often taking the form of propositions to make pecuniary compensation to the town, in the event such lay-out is made. Proffers of that nature can have no other intent or effect than to influence the public board toward making the judicial adjudication as to what "common convenience and necessity may require." Nevertheless, such propositions when acted upon have uniformly been held to be binding contracts.

Parks vs. Boston, 8 Pick. 218.
Crockett vs. Boston, 5 Cush. 182.
Arlington vs. Cutter, 114 Mass. 344.
Bell vs. Boston, 101 Mass. 506.
Melrose vs. Hiland, 163 Mass. 303, 311.

With reference to a grant of a location to a street railway company, however, there was no provision to be found in the Massachusetts Statutes, which required any consideration of public necessity and convenience as to the granting of a location, but only as to the imposition of restrictions. The local authorities had full power to grant the location to any company who desired it, quite regardless of any adjudication that "the public necessity and convenience required" such grant of location. The only burden upon the local authorities in granting a location was to impose such "restrictions" as they deemed the interests of the public to require. If, however, propositions, agreements and contracts with reference to public work, which in the first instance, quite apart from the matter of expense, requires an adjudication that "common convenience and necessity requires" the work to be done, are valid, as the foregoing cases demonstrate, *a fortiore* are agreements with reference to the location of street railways valid and binding.

The question of whether such locations constitute a contract between the city and the street railway company was left open in Cambridge vs. Cambridge R. R. Company, 10 Allen, 50, at page 58. The objections against maintaining the petition stated in the opinion of the Supreme Judicial Court of Massachusetts in that case were to a great extent obviated by §63, Ch. 113, of Mass. Public Statutes (§1, Ch. 294, Mass. Laws of 1866, and §57, Ch. 381, Mass. Laws of 1871) enacted after that case was decided. This statute conferred upon the Supreme Judicial Court jurisdiction in equity to deal with the whole subject matter of street railway locations and obligations arising therefrom.

B

Other Federal and State decisions.

There is a great weight of authority in the State and federal courts that the granting of a location and its acceptance constitutes a valid contract between the city and street railway company.

Des Moines St. Ry. Co. vs. Des Moines B-G St. Ry. Co., 73 Iowa, 513; S. C., 74 Iowa, 585.

In all essential respects, the case at bar is exactly parallel to

Coast Line Co. vs. Savannah, 30 Fed. Rep. 646.

There the provision in the ordinance granting the right to the railroad company to lay the rails was in the following language:

> "In the event of the paving by the city of the whole or any portion of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company, at its own expense and cost."

Upon the question whether this was a contract, the Court says upon pages 648 and 649 as follows:

> "That the ordinance of the city, authorizing the construction of the railroad, is a contract between the two corporations, in the opinion of the court, is scarcely susceptible of doubt. Had permission

been given by the city simply to build the road, without consideration, and had the company in good faith built it accordingly, it would have been a contract, more properly perhaps a grant, which in legal effect, Mr. Justice Blackstone tells us, 'differs in nothing from a contract.' A grant in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant."

In New York vs. Eighth Avenue R. R. Co., 43 Hun., 614, it appeared that an agreement was made with the city by which authority was given to construct the railroad in certain streets, one of the terms upon which the authority was granted being that there should annually be paid to the city for each car a certain license fee. It was contended that a subsequent act of the legislature has worked an abrogation of this agreement. With reference to this contention, the Court, on page 619 says,

"But if the act by any possibility could be so construed as to supersede the liability of the company to pay the license fees, it would be inoperative, for it had become liable to make such payments by the contract under which it acquired the right to construct and operate the principal part and residue of its road, and over which its cars have been and are drawn and operated. It was one of the stipulations entered into and inducing this concession, and from the time of its confirmation and ratification by the act of 1854, it has clearly been binding and effectual upon the railroad company. And after having become so, the legislature was prevented by sub-division 1 of Section 10 of Article 1 of the Constitution of the United States which prohibits the states from passing any law impairing the obligation of a contract from relieving the company of the obligation to perform this part of the contract."

A further confirmation of the contention that an extension of location for a street railway company is a

contract, is the provision of sec. 21 of chap. 113 of the Public Statutes, requiring that there be an "acceptance in writing," "filed in the office of the clerk of the city or town within thirty days after receiving notice" of the granting of the extension. This smacks of contract. The requirement is that such acceptance be filed with the city clerk, who is the official custodian of the valuable paper and contracts of the municipality. No such statutory mandate exists as to locations for electric telephone and telegraph poles; sec 3, chap. 109 of Public Statutes; or as to electric light poles; chap 221, Laws of 1883; or as to companies for the transmission of intelligence by telephone; chap. 434, Laws of 1889; or as to locations for gas pipes; sec. 75, chap. 106, Public Statutes; or as to private steam railroads crossing streets; sec. 224, chap. 112 of Public Statutes. This requirement of filing of acceptance gains added strength for the argument that it is a contract from the fact that the city clerk, a representative of the corporate entity, is the officer to receive the acceptance, rather than the Aldermen or the clerk of the Aldermen.

It has often been held that acceptance by a railroad company of a location which is a mere license to lay tracks in city streets upon certain terms and conditions contained in the license becomes a contract between the parties.

Troy v. Troy & L. R. Co., 49 N. Y. 657.

Indianapolis C. R. Co. v. Lawrenceburg, 34 Ind 304.

To the point that the acceptance of a location constitutes a contract:

Chicago v. Sheldon, 9 Wall., 50

Des Moines City St. R. Co. v. Des Moines, 90 Iowa, 770.

State v. Corrigan Con. St. Ry. Co., 85 Mo. 263-278.

Springfield Ry. Co. v. Springfield, 85 Mo. 674-677.

Kansas v. Corrigan, 86 Mo., 67-70.

People v. O'Brien, 111 N. Y., 1-52.

Citizens St. Ry. Co. v. Memphis, 53 Fed. Rep., 715-732.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep., 153.

Africa v. Knoxville, 70 Fed. Rep., 728-734.

Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala., 465.

Chicago & Western Indiana R. R. Co. v. Chicago, St. Louis & Pittsburg R. R. Co., et al, 15 Ill., App. 587.

Wright v. Milwaukee Electric Rlwy. & Light Co., 95 Wis., 29-35

City of Belleville v. Citizens Horse Rlwy. Co., 152 Ill., 171.

Harvey v. Aurora & Geneva Rlwy. Co. 186 Ill., 283-293.

Houston v. Houston St. Rlwy. Co., 83 Texas, 548.

Rutland Co. vs. Marble Co., 65 Vt., 377-381.

City Ry. Co. v. Citizens' R. R. Co., 166 U. S. 557 S. C. 65 Fed. Rep., 746 and 64 Fed. Rep. 647.

Alleghany v. Millville Co., 159 Pa. St. 411.

Arcata v. Arcata R. R. Co., 92 Cal., 639.

Brooklyn Central R Co. v. Brooklyn City R. Co., 32 Barb. 358.

Indianola v. Gulf W. T. & P. R. Co., 56 Texas, 594.

Cincinnati R. R. v. Carthage, 36 O. St., 631.

Pittsburg, &c., Ry. Co. v. Birmingham, 51 Pa-St., 41.

State v. N. Orleans City, 43 La. An., 550.

N. Y. & N. H. R. R. v. New York, 4 Blatchford, 193.

Detroit v. Detroit City Ry. Co., 37 Mich., 558.

Hovelman v. Kansas City Horse Ry. Co., 79 Mo., 632.

Mercantile Tr. & Dep. Co. vs. Collins Park & B. R. Co., 101 Fed. Rep. 347 at 350.

City of Lansing vs. Lansing City Electric Ry. Co., 66 N. W., 949 (Mich).

In Indianapolis and Cincinnati R. R. Co. vs. Lawrenceburg, 34 Ind., 304, the grant of the right to construct the railroad contained a provision that the company should fill in all streets enough to make a convenient passage over the tracks. The company, after accepting the right and constructing its road, declined to do the filling. The city performed the work and brought suit to recover the expense. It was held that the city could maintain the action, the Court saying on page 307,—

> "There can be no doubt that as the railroad company accepted the ordinance of the city and built a railroad through the city by virtue thereof it was bound to comply with the terms and conditions specified in the ordinance."

To the same point is the language of the court in New Orleans v. Great Southern Telephone & Telegraph Company, 40 La. Ann., 45, quoted with approval by Mr. Justice Brewer in City of St. Louis vs. Western Union Telegraph Company, 148 U. S, 92-103, as follows:

> "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous conditions therein. Such has been the well-recognized doctrine of the authorities since The Dartmouth College Case, 4 Wheat., 518."

C

Contract was with City of Worcester.

If it be said that the grant of location to the defendant in error was made by the Board of Aldermen not representing the municipality, but as a board of public officers, and that therefore the contract is not with the plaintiff in error, the answers to the proposition are several:

a. The Supreme Judicial Court of Massachusetts, in its opinion respecting this very matter, treats the location as granted by the city or town, when it says (182 Mass., p. 48),

> " It seems to us that the locations given to street railway companies in public streets *by cities and towns* in this Commonwealth," etc.

b. The Board of Aldermen in the Massachusetts statute is as much a municipal authority and no more public officers than the Boards under discussion in City Ry. Co. vs. Citizens' St. R. Company, 166 U. S., 557, Cleveland vs. Cleveland City Railway Company, 194 U. S., 517, and Detroit vs. Detroit Citizens' Railway Company, 184 U. S., 368.

c. If the Board of Aldermen in granting the location acted as a board of public officers (Cambridge vs. Cambridge R. Company, 10 Allen, 50, Underwood vs. Worcester, 177 Mass., 173) they also acted in a dual capacity, having a right to represent and representing for this purpose the municipality itself, so far as it had a property interest to be subserved.

The general duty was imposed upon the city of Worcester to care for the public streets of the city and to keep them in repair at the time the location was granted, --- which duty has been continued ever since.

Mass. P. S., ch. 52, §1.

Mass. Rev. Laws, ch. 51, §1.

With reference to the subject-matter of repairs of streets, and the surface material of streets, therefore, the city of Worcester had a property interest both by reason of the statutory obligation imposed upon it, with the penalties for failure to perform them (§23, ch. 51, Mass. Rev. Laws) and also by reason of the statutory liability imposed upon towns for injuries received by defects in such ways (§18, ch. 51, Mass. Rev. Laws.)

Butman vs. Newton, 179 Mass., 1.

Its pecuniary interest in this subject-matter is so great as to make it legal for the municipality to fail to follow the path pointed out by the statute for care and repair of its streets and ways, in leaving the subject to road commissioners, highway surveyors or street commissioners, and undertaking through its own agencies to care for the repairs of streets. When acting through such special agents it is responsible in the same way that private corporations are responsible for the neglect or misfeasance of their agents.

Collins vs. Greenfield, 172 Mass., 78-81.
Brookfield vs. Reed, 152 Mass., 568.
Pratt vs. Weymouth, 147 Mass., 245-254.
Deane vs. Randolph, 132 Mass., 475.
Hawks vs. Charlemont, 107 Mass., 414.
Perry vs. Worcester, 6 Gray, 544.

If therefore, the Board of Aldermen in granting the location undertook to prescribe conditions as to repair of streets, these conditions related to a subject-matter about which the city had the right to make a contract, and as to which in its municipal capacity it had a deep pecuniary interest well recognized by a long line of decisions of the Massachusetts Supreme Court.

Tindley vs. Salem, 137 Mass., 171.

d. Indeed, it has been intimated by the Supreme Judicial Court of Massachusetts, respecting the grant-

ing of locations to street railway companies, that the municipality in its private capacity has a corporate interest in the subject-matter of keeping its streets in repair.

Flood vs. Leahy, 183 Mass., 232-6.

e. By a line of decisions, it has been held by the Supreme Judicial Court of Massachusetts that propositions made to the Board of Aldermen or Selectmen or agreements made with them, respecting the laying-out, widening or constructing of a street, and as to damages occasioned thereby, is in effect, when acted upon, an agreement by the municipality itself.

Parks vs. Boston, 8 Pick., 218.
Crockett vs. Boston, 5 Cush., 182.
Arlington vs. Cutter, 114 Mass., 344.
Bell vs. Boston, 101 Mass., 506.

"The agreement was for the benefit of the town, and the bringing of the action upon it is sufficient evidence of an acceptance of it, and of a ratification of the act of the selectmen in taking it."

Melrose vs. Hiland, 163 Mass., 303, 311.

D.

Is the defendant estopped to deny the contractual legality of the conditions sought to be enforced?

The situation existing between the City of Worcester and the defendant at the time of the grant of the locations containing these conditions presents every element necessary to make out legal estoppel. The railway company petitioned the Board of Aldermen for a location. That petition was granted, and the location was duly accepted in writing by said Board of Directors of

said Worcester Consolidated Street Railway Company, all as required by law, and said acceptance was by said respondent company filed with the City Clerk of the City of Worcester, as alleged in paragraph four of the bill. The location as granted was a fair and unequivocal statement of what would be required of the street railway company. By the act of the defendant in accepting the location without indicating either by word or act its intention to contest at any time the validity of any of the conditions annexed to the location, it induced the Board of Aldermen to believe that it intended in good faith to comply with these conditions.

City Ry. Co. vs. Citizens' Ry. Co., 166 U. S., 557-566.

Columbus vs. Columbus St. Ry. Co., 45 Ohio St., 98.

Brooklyn Central R. R. Co. vs. Brooklyn St. Ry., 32 Barb., 358.

"The ordinance, the acceptance thereof and the enjoyment of the benefits of its provisions by the respondent company, must be regarded as establishing, so far as the respondent company is concerned, and as estopping it to deny, the validity of the conditions imposed."

People vs. Suburban Railroad Co., 178 Ill. 494, 594, at 606.

The street railway company has no right to demand and receive locations coupled with conditions, the granting of which is not by right to the railroad company, but by grace, and avail itself of the benefits derived from such location without bearing its burdens.

State vs. Stone, 118 Mo. 388.

The plainest dictates of fairness demanded of the street railway company that before filing its acceptance it should indicate to the Board of Aldermen if it intended to contest any of the conditions annexed to the

location. The Board of Aldermen could then have been forewarned of the attitude of the street railway company, and modified the restrictions or taken other steps to protect itself before the location had been finally acted upon. The failure to indicate such intention by the street railway company has given "a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged."

Bigelow on Estoppel, 4th Ed. 445.

Of course the duration of the contract was limited by the term of the defendant in error's location in the street. This was liable, prior to 1898 and at the time of the granting of the extensions of location in question, to be revoked at any time by order of the board of aldermen under the provisions of s. 23, c. 113 of the Massachusetts Public Statutes, which was as follows:—

> "Sect. 23. The board of aldermen or the selectmen, at any time after the expiration of one year from the opening for use of a street railway in their city or town and after notice published as provided in section twenty-one and a hearing, if in their judgment the interests of the public so require, may order that the location of any track shall be revoked; and the company shall thereupon remove the same in conformity with such order, and shall put the street in as good condition as it was in immediately before being occupied by said track."

II.

WHAT OBLIGATIONS AROSE FROM THE CONTRACT?

The foregoing discussion and particularly the cases in this court of Cleveland vs. Cleveland City Railway Co., 194 U. S., 517; City Railway Company vs. Citizens' R. R. Co., 194 U. S., 557; Detroit vs. Detroit Citizens' St. Ry. Co.. 184 U. S., 592; have established clearly that such contracts, so far as the public service corporation is concerned, are inviolable and cannot without its consent be modified or changed.

The only matter to be considered, then, under this branch of the discussion is whether a municipal corporation is entitled to the same constitutional protection and immunity from legislative interference that is enjoyed by the public service corporation. The determination of this inquiry involves an investigation into the nature and extent of rights possessed by the plaintiff in error as a municipal corporation.

A

Contracts of a Municipality inviolable.

It will doubtless be the contention of the defendant in error that the state has the paramount control of streets; that the obligation to repair them heretofore has been merely for the convenience of administration vested in the municipality; and that at any time the state has a right to resume its supremacy of control over the subject matter of streets. However this may be as an abstract proposition, it is not the situation which confronts us. It may be conceded that the state might, as to the whole of Massachussetts or as to any part of it, assume entire control of streets. But what the legislation in question undertakes to do is to continue to impose the burden of responsibility for repair of streets wholly upon the municipality, and at the same time, to destroy the obligation of all contracts it had

made with street railway companies to relieve it of the whole or any part of that burden. The federal constitution protects contracts of this nature from such legislative assaults.

The contracts in question relate to the performance of a public duty, namely, the maintenance and repair of streets. The obligation resting upon the plaintiff in error, as set out in s. 1, c. 51 of the Massachusetts Revised Laws is as follows:

> "Highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travelers, with their horses, teams and carriages at all seasons."

This duty is a public duty, but so long as it rests upon the cities and towns, it is a subject about which they may contract and assume liabilities and subject others to contractual liabilities in the same manner and to the same extent as if it were a private corporation in the performance of a private duty. This at least is the effect of Massachusetts decisions with reference to the rights and liabilities of municipal corporations over streets and ways.

It can make contracts with reference to the laying-out and widening of streets, which are recognized as legal and enforceable.

> Arlington vs. Cutter, 114 Mass., 344, and cases cited.
>
> Atkinson vs. Newton, 169 Mass., 242.
>
> Townsend vs. Hoyle, 20 Conn., 1.

It can make contracts with reference to the perpetual repair of streets and highways.

> Brookfield vs. Reed, 152 Mass., 568.

It may well be that the words "unless otherwise provided" in said sec. 1, c. 51, Mass. R. L. have reference to this recognized right of contract.

It can also so contract with reference to the repair of highways as to become personally responsible and thereby relieve itself of the immunity which otherwise would attach to public work.

Butman vs. Newton, 179 Mass., 1.

It could also unquestionably receive legacies and gifts for the purpose of repairing its highways.

Dillon, 4th Ed., sec. 596.

These rights which it has acquired with reference to its duty, the city holds not in its public capacity as a branch of the sovereign power and subject to the unrestricted control of the legislative power, but it holds them as a corporate individual, having rights of its own, respecting the duties which it is required to perform, and which it is at liberty to enjoy undisturbed by any agency of the State itself and in the enjoyment of which it is entitled to the protection of the Federal constitution.

Detroit vs. Park Commissioners, 44 Mich, 602, 604.

In sect. 68 of Volume I, Dillon on Municipal Corporations, 4th ed., the author states that "The weight of opinion seems to be in favor of the doctrine that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature."

In support of this proposition are cited:—

Richland County v. Lawrence County, 12 Ill. 1.

Montpelier v. East Montpelier, 29 Vt. 12. S. C. 27 Vt. 704.

Pawlet vs. Clark, 9 Cranch 292, 336.

Terret v. Taylor, 9 Cranch 43, 52.

Mr. Justice Story in Dartmouth College case, 4 Wheat. 518, 663.

In Grogan vs. San Francisco, 18 Cal. 590, Mr Chief Justice Field asserted that:—

"Nor is there any difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are mere instrumentalities of the State for the convenient administration of the Government, and their powers are under the entire control of the Legislature; they may be qualified, enlarged, restricted, or withdrawn at its discretion. But these bodies, says Kent, 'may also be empowered to take and hold private property for municipal uses, and such property is invested with the security of other private rights.' (1 Com. 3 vol. 275.) 'It may also be admitted,' observes Mr. Justice Story, in his opinion in the case of The Trustees of Dartmouth College v. Woodward. 'that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith.' (4 Wheat. 694.) 'The inhabitants of the City of New York,' says the Supreme Court of New York, 'have a vested right in the city hall, markets, water-works, ferries, and other public property, which cannot be taken from them any more than their individual dwellings or storehouses. Their rights, in this respect, rest not merely upon the Constitution, but upon the great principles of eternal justice, which lie at the foundation of all free governments.' (Benson vs. the Mayor of New York, 10 Barb. 245.) The authorities are all to the same purport. A legislative grant is an executed contract, and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. This was expressly decided by the Supreme Court of

the United States in Fletcher vs. Peck, 6 Cranch. 137. It cannot therefore be destroyed, and the estate be divested by any subsequent legislative enactment. And though a municipal corporation is the creature of the Legislature, yet when the State enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the Legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."

See also,

People v. O'Brien, 111 N. Y. 1.

At the end of the same section 68, Mr. Dillon summarizes his conclusions as follows: — "It is believed by the author * * * that while the legislature has full power of legitimate regulation and control, it cannot deprive them, (that is, in essence, the people of the locality at whose expense it has been acquired, or for whose benefit it was granted) of such property. It is in effect fastened with a trust for the incorporated municipality as long as the legislature suffers it to live, and for the benefit of the people of the locality, if the corporate entity which represents their rights shall be dissolved."

The rule is thus stated in the 7th Edition of Cooley's Constitutional Limitations at page 344: —

"The rule upon the subject we take to be this: when corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes under their charter shall not be taken from them and appropriated to other uses."

People v. Batchellor, 53 N. Y., 128.
People v. Chicago, 51 Ill., 17.

People v. Tappan, 29 Wis., 664.
People v. Hurlbut, 24 Mich., 44.
Hewison v. New Haven, 37 Conn., 475.
New Orleans & c. R. R. Co. v. New Orleans 26 La. An., 517.

The fundamental question is not whether the Legislature can enact primary responsibility with reference to repairs of highways to rest wholly upon the city, but whether it can deprive the city of the right it has obtained to reimburse itself respecting repairs in portions of the public way. For instance, it probably could not be successfully contended that the Legislature did not have a right to repeal s. 32, c. 113 of the Massachusetts Public Statutes, which put the compulsory duty upon street railways to maintain in repair a portion of the surface material of streets occupied by its tracks. The attempt, however, to sweep away contract obligations which the city has acquired with reference to the repair of streets involves a very different conception of legislative powers. It might as well be contended that a legacy or gift made by a private individual to the City of Worcester for the purpose of keeping Green and Millbury Streets in repair could by act of the Legislature be diverted to other uses or transferred to the street railway company.

As was said in Detroit vs. Detroit & Howell Plank Rd. Co., 43 Mich. 140-148:—

> "In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State. It is enough that it has become private property, and it is then protected by the 'law of the land.' Even municipal

corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquired for local purposes, and the State cannot despoil them of it. Terrett vs. Taylor, 9 Cr. 43; Pawlet vs. Clark, 9 Cr. 292; State vs. Haben, 22 Wis. 660; People vs. Common Council, 28 Mich. 228."

Contract rights stand at least upon as strong ground as would money raised by general taxation. Even in the exercise of the taxing power, the Legislature has no right to issue its mandate to a municipality that it shall contribute its monies raised from taxation toward the construction of a railroad or other public service corporation.

People vs. Batchellor, 53 N. Y. 128, 138-142.

It cannot be successfully contended that the authority possessed by the Legislature to determine either by its general law or by its special act of incorporation, what shall be the extent of the capacity of a city to acquire and hold property, is equivalent to or contains within itself the authority to take away from the city property it has actually acquired in any legitimate way. As to property it has thus acquired, either for lightening the burdens of taxation or for extension of other public benefits to its inhabitants, and whether such property rights be acquired by gift or by contract, the municipality is entitled to the like protection as any natural person within the state.

As it is one of the principles of every free government that "it is not in the power of the Legislature to create a debt from one person to another or from one corporation to another, without the consent, expressed or implied, of the party charged," so also it is beyond the legislative power to wipe out a valid debt subsisting from one person or corporation to another person or corporation, without the assent of the creditor.

Co. of Hampshire vs. Co. of Franklin, 16 Mass., 76.

Bd. of Park Com. vs. Detroit, 28 Mich. 228-240.

"The constitutional principle that no person shall be deprived of property without due process of law, applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion outside the city limits, are not concerned, the state can no more by a process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to said use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state."

Of the cases that may be cited in support of the proposition, that the contract in question does not rise to the dignity of being under the protection of the Federal Constitution; Essex Public Road Board vs. Skinkel: 140 U. S., 334, was a case relating purely to taxation. New Orleans vs. New Orleans Water Co.: 142 U. S., 79, related to the interpretation of a statute passed by the Legislature, which it was contended created of itself a contract. It was held that 1st, there was no contract; 2nd, the city had repudiated it, and 3rd, that it being an act of the Legislature relating to a municipality, the Legislature itself might change it. C. B. & Q. R. R. Co. vs. Nebraska: 170 U. S. 57, was decided upon the exercise of police power. Brown vs. Turner: 176 Mass., 9, passed upon special legislation relating to the Boston subway. Laramie vs. Albany: 92 U. S., 307, related solely to the legislative power to divide towns.

In the case at bar, the city had acquired by its contract, an obligation running from the defendant in error to it, to keep in repair certain portions of certain streets It is no more within the power of the Legislature to change, alter or rescind this contract than if such contract had been made with a private individual. If the city had made a contract with a paving company to furnish a certain number of paving blocks each year, it would hardly be contended that the Legislature might intervene and, by its enactment, provide that the defendant in error should receive the benefit of that contract, nor could it be successfully contended that the Legislature might relieve such paving company of such obligation to comply with the terms of the contract without the assent of the city. Courts should guard the contractual rights of municipalities with as jealous care as those of private individuals.

Suppose the City of Worcester had located a schoolhouse upon a certain lot, at the same time taking an agreement from an adjoining land owner that, if the schoolhouse should be located there, the land owner would, for a period fifty years, paint the schoolhouse; could the legislature relieve the land owner of the obligation to perform this contract? Yet the providing of schoolhouses is no more and no less a function of sovereignty in Massachusetts than the repair of streets.

B

Excise Tax no substitute for Contracts.

It may be claimed that the legislature has, in this instance, substituted an execise tax for the contract obligations, and that this is sufficient to remunerate the municipality for contract obligations with street railways. It can make no difference with the principle involved whether the legislature has furnished a sub-

stitute or not. The character and value of the substitute can be changed at will by a legislature which meets annually. The fundamental objection is that the legislature has no right to meddle with the contract without the assent of the municipality.

But, in fact, the legislature has made no substitution, and has attempted to make no substitution, for the greater part of the obligations contained in the contracts which are the subject matter of this litigation.

S. 7 of said c. 578, provides an arbitrary excise tax equal to such proportion of the percentages of the gross receipts of the company therein stated, as the length of the tracks operated by it in public ways of such city or town bears to the total length of track operated by it in public ways. This is a purely arbitrary tax. It is not based, and does not by its terms, profess to be based, upon the expense of the municipality it caring for its ways. S. 8, however, furnishes the basis upon which the permanent excise tax is to be computed. That basis is only such a payment as will yield to the municipality an amount equal to the cost of work of repairing streets, which, under the provisions of said c. 578, the municipality is required to do, and which by law it was not previously required to do. So that the legislature did not intend to make an excise tax which should be a fair equivalent, or in any sense an equivalent, for the contractual obligations which the city may have secured from the street railway companies as to the repair of streets.

III

IS THERE PROPERTY OR A PROPERTY RIGHT WHICH HAS BEEN TAKEN AWAY FROM ANY PERSON WITHOUT DUE PROCESS OF LAW?

I

As to property.

Mr. Justice Bradley, in Campbell vs. Holt, 115 U. S. 620, in defining what property and property rights may be, says:—

> "That clause of the amendment which declares that 'no State shall deprive any person of life, liberty or property without due process of law,' was intended to protect every valuable right which a man has. The words life, liberty and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. . . . In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself."

The question then, upon this branch of the case, is:—

Do the obligations to pave and maintain paving contained in the conditions of grants of locations referred to in the pleadings of the plaintiff in error, when accepted in writing by the defendant by its acceptance filed with the City Clerk of the city of Worcester, constitute property and property rights in the city of Worcester,

of which it is deprived by c. 578 of the Massachusetts Laws of 1898, without due process of law.

If it be assumed that the obligations to pave described in the pleadings of the plaintiff in error were not contracts, they are at least restrictions. This may be assumed to be established by the foregoing discussion, under the first branch of this argument respecting the contract nature of the locations.

A

Restrictions constitute valuable property rights.

They are comprehended within the language of Chief Justice Marshall in Soulard vs. United States, 4 Pet., 511, wherein at p. 512 he says:—

"The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed. In its broadest sense, the word property includes all rights and interests in real and personal property, and also any easements, franchises and incorporeal hereditaments."

Metropolitan City Ry. Co. vs. Chicago, 87 Ill., 317.

Building restrictions are a common illustration of property rights of restrictions which are often of very high value. The right of a residential land owner to enforce a restriction that buildings upon some street shall not be erected nearer than a specified distance to the street line enhances appreciably property values and becomes a valuable species of property right. The same is also true of restrictions as to height of buildings.

The City of Worcester, by means of the restrictions in question, had required the defendant in error in effect to so use the surface of the streets as to not unreason-

ably wear the same out. Double track locations such as were most of these described in the record intensify travel upon the sides of streets, the inevitable tendency of which is to wear out paving much more rapidly than if travel could be distributed evenly over the whole surface of the street. The right of the city to have this paving kept in repair was as much a property right as would be blocks of paving purchased by the city for use upon the streets. Under Massachusetts decisions, all municipalities have a certain property right with reference to highways.

It is established by a long line of decisions of the Supreme Judicial Court of Massachusetts that although the repair of roads and bridges is by general law imposed upon cities and towns (Rev. Laws of Mass. c. 51, s. 1), yet because there is also imposed upon the municipality a statutory liability for injuries sustained in person or damage received in property by a traveler upon highways by reason of a want of repair in the highways, which might have been remedied by reasonable care on the part of municipalities (Rev. Laws of Mass. c. 51, s. 18), and because also of the penalties imposed upon municipalities for failure to keep its ways in repair (Rev. Laws of Mass. c. 51, ss. 17 and 23), and further because of the municipalities' responsibility for the cost of construction of ways, the municipality has such a direct pecuniary interest in the economical and thorough performance of the work of repair and construction of ways as to render it subject to a liability beyond that imposed by the statute, that is, to a common law liability, when and in the event that the municipality undertakes such work through its own agencies or by any other instrumentality than the public officers by law provided for the purpose, and that such liability exists even when such work is performed by the public officers under the special direc-

tion of the municipality, and not solely under their authority as public officers.

Perry v. Worcester: 6 Gray 544.
Deane v. Randolph: 132 Mass. 475.
Hill v. Boston: 122 Mass. 344.
Pratt v. Weymouth: 147 Mass. 245-254.
Brookfield v. Reed: 152 Mass. 568.
Collins v. Greenfield: 172 Mass. 78, 81.

In Tindley v. Salem: 137 Mass. 171, the court says upon this subject at page 173:

"In some of these cases, the assumption of the work by the town itself has been voluntary, and apparently because it preferred that the work should be done by special agents rather than by the surveyors, or others, upon whom, in the absence of such special provision, the law would devolve the duty of prosecuting it. But in all such cases a prominent element in the action of the city or town must have been with reference to its continuing liability to statutory penalties, or responsibility in damages to persons who might receive injuries in their persons or property through defects in the ways. This consideration was made the foundation of the decision in Hawks v. Charlemont, 107 Mass. 414. The case of Deane v. Randolph, 132 Mass. 475, is of the same class. In Sullivan v. Holyoke, 135 Mass. 273, there was evidence tending to show that, as incident to its liability for defective ways, the city had undertaken to light the streets, though not bound to do so, and that it kept naphtha for that purpose, and stored it negligently. The case was a close one; but in the opinion of a majority of the court it fell within the principle of Hawks v. Charlemont, and Deane v. Randolph. All that was decided in Perry v. Worcester, ubi supra, may stand also upon the same ground, as well as upon the ground heretofore mentioned. The city had voluntarily assumed, by agents of its own, to rebuild a bridge which it was bound to maintain and keep in re-

pair; and it performed the work in such a manner as to cause injury to private property, through unskilfulness or negligence. In all of these cases, the city or town was acting, not merely in the discharge of a public service, but also with refeence to penalties and liabilities imposed upon it by law for imperfect work. The pecuniary motive came in. It was acting in furtherance of its own pecuniary interest, as well as for the benefit of the public."

In the recent case of Butman vs. Newton: 179 Mass. 1, at page 6, the court re-affirms this rule of liability in the following language:

"A town which undertakes to make repairs on ways within its limits, by its own agents, is an exception to the general rule. (That is, of exemption from liability). In that case it has a pecuniary interest in the matter by reason of its statutory liability for a defect in the way; this distinction is pointed out, and the whole subject is so exhaustively stated by C. Allen, J., in Tindley v. Salem, 137 Mass. 171, 172, 173, that it is not necessary to restate the reasons at length in this case."

The City of Worcester thus, under the Massachusetts law, had a pecuniary private interest in the repairs of its streets, provided it undertook to act respecting its statutory liabilities through strictly municipal agencies, or through any other instrumentality than these provided by general law acting solely under the authority conferred by general law.

It follows as a necessary and inevitable corollary from this proposition of liability, that the municipality under the Massachusetts law has a right to undertake, through any instrumentality it may see fit to employ, the performance of its statutory obligation for the keeping in repair of highways. The above cited cases show that the city is immune from liability for the

negligence of those who repair its highways only when such repairs are undertaken through the public officers (which in Massachusetts are either highway surveyors, road commissioners or street commissioners) by general law provided for that purpose, and then only when these public officers are acting in the manner pointed out by the general law. Municipal liability for their negligence, when these officers are acting under the instructions of the municipality rather than in the manner marked out by statute, and municipal liability for the negligence of those other agencies by which the repair of streets may be undertaken, rests in its last analysis upon the right of the city to employ special agencies for the purpose of performing the duty of repair of ways, but this liability exists on the theory of agency, and such agency can only in turn rest upon valid action respecting the subject matter. Therefore, the municipality is recognized by the Massachusetts law as being clothed with authority to arrange in any way it sees fit as to the repair of streets. If it were not clothed with such authority, all acts of attempted supervision such as are discussed in Buttman vs. Newton, Perry vs. Worcester and the other cases above cited would be ultra vires, and the municipality would be under no liability.

Morrison vs. Lawrence, 98 Mass. 219.
Sampson vs. Boston, 161 Mass. 288.
Cavanagh vs. Boston, 139 Mass. 426.
Smith vs. Rochester, 76 N. Y. 506
Anthony vs. Adams, 1 Met. 284 at 287.

The City of Worcester had procured the laying of the pavement in the various streets in question by means of a compliance by the defendant in error with the conditions in the several grants of locations requiring pavement to be laid. This is distinctly alleged in the declara-

tion in the action of contract and in the petitions for mandamus and in the bills in equity. It thus acquired a property right to have continued by the Street Railway Company the performance of the duty reposed in the city to maintain the surface of the street in repair.

A board of municipal officers granted the extremely valuable privilege to the defendant in error of constructing and operating a street railway in certain streets of a large and rapidly growing city, and in return for receiving this inherently increasingly valuable privilege, the Street Railway Company was willing to and voluntarily did assume, by its formal acceptance of the grants of location, this obligation as to maintenance of the paving of streets and promised to relieve to the extent stated in the conditions the city of Worcester from its statute imposed liability to keep the streets in repair throughout their entire width.

This is a property right in the city of which even the Legislature had no right to deprive it. The question does not in this case arise whether the Legislature might transfer the obligation to keep the streets in repair to some other public body, either with or without the right against the Street Railway Company, but it is a question of relieving the private corporation of its obligation voluntarily assumed for a valuable consideration to do something for the city of Worcester. The construction contended for by the defendant in error, however, involves the taking away of this property right of the City and relieving the Street Railway Company entirely of its obligations in this respect without at all relieving the plaintiff in error of its statutory obligation to maintain the streets in repair, which still subsists without modification or derogation.

This contention of the plaintiff in error does not impinge at all upon the well-settled authority of the Legislature over municipalities in Massachusetts estab-

lished in Weymouth and Barre Fire District v. County Commissioners, 108 Mass. 142, and Commonwealth v. Plaisted, 148 Mass. 375, 386, nor upon the principle established by this court in East Hartford vs. Hartford Bridge Company, 10 How. 511. The claim of property right in the present cases rests upon the equally well recognized proposition that legislative power over municipalities is not universal and absolute and does not extend to property or property rights, acquired by a city for special purposes nor to rights of immunity, in respect to both of which the municipality is recognized as having a right of private ownership, of which it cannot be deprived in any other way than can other private owners of property be deprived.

In Mt. Hope Cemetery v. Boston, 158 Mass. 509 at page 512, the Supreme Judicial Court of Massachusetts said:

> "But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. Board of Commissioners v. Lucas, 93 U. S. 108, 114, 115. Mount Pleasant v. Beckwith, 100 U. S. 514, 533. Railroad Co. v. Ellerman, 105 U. S. 166, 172. Cannon v. New Orleans, 20 Wall. 577. Mayor, etc., of New York v. Second Avenue Railroad, 32 N. Y. 261. People v. Batchellor, 53 N. Y. 128. People v. O'Brien, 111 N. Y. 1, 42. Webb v. Mayor, etc., of New York, 64 How. Pr. 10. Montpelier v. East Montpelier, 29 Vt. 12. Western Saving Fund Society v. Philadelphia, 31 Penn. St. 175. People v. Detroit, 28 Mich. 228, 235, 236, 238. People v. Hurlburt, 24 Mich. 44. Detroit v. Detroit & Howell Plank Road, 43 Mich. 140. Thompson v. Moran, 44 Mich. 602. Louisville v. University of Louisville,

15 B. Mon. (Ky.) 642. Richland v. Lawrence, 12 Ill. 1. People v. Mayor, etc., of Chicago, 51 Ill. 1. Grogan v. San Francisco, 18 Cal. 590. Hewison v. New Haven, 37 Conn. 475."

The language used by the Supreme Court of the United States now to be quoted is decisive in support of this proposition.

In Board of Commissioners vs. Lucas, 93 U. S. 108, at 114 the court speaking through Mr. Justice Field said:—

> "Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn at the pleasure of the Legislature. Their tenure of property, derived from the State for specific public purposes, or obtained for such purposes through means which the State alone can authorize, that is, taxation, is so far subject to the control of the Legislature, that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence. But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the Legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the Legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants."

In Mt. Pleasant vs. Beckwith, 100 U. S. 514, at 533 the court speaking through Mr. Justice Clifford said:—

> "Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as

are private persons, nor is it in the power of the Legislature to authorize them to violate their contracts."

In Broughton vs. Pensacola, 93 U. S. 266 at page 269, the court speaking through Mr. Justice Field said:

> "The inhibition of the Constitution, which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of, or escape from, liabilities, the creation of which it authorized."

Mr. Justice Matthews, delivering the opinion of the court in New Orleans, M. & T. R. Co. vs. Ellerman, 105 U. S. 166 at 172, said:—

> "Whatever powers the municipal body rightfully enjoys over the subject is derived from the Legislature of the State. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."

As supporting the contention that the municipality has full and complete control of streets and impliedly, therefore, the right to make any arrangement as to their use and repair which it may think best, the language is most significant which was used by Mr. Justice Harlan in Richmond v. Southern Bell Telephone & Telegraph Company, 174 U. S. 761 at page 777:

> "But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions."

The cases before cited, showing the property interest and pecuniary rights of a municipality as to a public way, when taken in conjunction with the contract power of the municipality with reference to the repair of streets, established in Brookfield v. Reed, 152 Mass. 568, places the property rights of the city in respect of highways, upon the same basis as its property rights with in sewer systems and water works. Property rights of municipalities in sewers are recognized in a multitude of cases.

In Johnston v. District of Columbia, 118 U. S. 19, the court, speaking through Mr. Justice Gray, says:—

> "The duties of municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience thoughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to a revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repairs of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

Mr. Justice Folger, speaking for the Court in Maxmilian v. Mayor, 62 N. Y. 164, says:

> "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from a grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of

which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty of the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the the sovereign power for the benefit of all citizens, the corporation is not liable for non user, nor for misuser by the public agents."

Other cases of the Supreme Judicial Court of Massachusetts holding the municipality liable, as any private corporation is liable, for sewer works (recognizing thus the private property right of the city in the sewer system) are—

Coan v. Marlborough, 164 Mass. 206-208.
Child v. Boston, 4 Allen 41.

Water works owned by a city are also treated with reference to liability, as private property, and the municipality held to the same degree of liability as it would if it were an aqueduct corporation.

Hand v. Brookline, 126 Mass. 324.
Johnson v. Worcester, 172 Mass. 122.
Lynch v. Springfield, 174 Mass. 430.
Esberg Gunst Co. v. Berlin, 55 Pacific Rep. 961. s. c. 34 Oregon 282.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.

Of course, it could not successfully be contended that the water works, or the sewer system of the City of Worcester, could be taken away from it and handed over to somebody else without due compensation, and

yet, its rights and liabilities with reference to the repair of streets, obtained from the defendant in error, rest upon the same basis in principle as does the acquisition of a water works plant or a sewer system.

Wharves owned by a municipality, which receives and charges wharfage for their use, are the property of the municipality, which has with reference to it the ordinary incidents of private ownership.

Mersey Docks Board v. Gibbs, 11 H. L. Cases, 686.

Petersburg v. Applegarth, 28 Gratton, 321.

Pittsburgh v. Grier, 22 Pa. St. 54.

So also gas works owned by the city are maintained as much for the private emolument and advantage of the city as for the public good, and the whole investment is the private property of the city, which cannot be confiscated or taken from the city by eminent domain.

Western Savings Fund Society v. Phila., 31 Pa. St. 183.

San Francisco Gas Co. v; San Francisco, 9 Cal. 483.

In Middleborough v. New York, New Haven & Hartford Railroad Co. (179 Mass. 520), the Supreme Judicial Court of Massachusetts strongly intimates that an electric light plant of a municipality cannot be taken without compensation.

To deprive the City of Worcester of the right to have the defendant in error furnish its paving blocks year by year as required is as much confiscation of private property as for the legislature to convert the City Hall into a station for the street railway company, or to compel the city to turn over its electric light plant, if it owned one, to furnish power for the company. Because the property right which the city had acquired for its private advantage and emolument in providing for the main-

tenance and repair of its streets related to a subject-matter, about which it had also public responsibilities and relations, thus blending in a measure powers and rights granted exclusively for public purposes and those acquired for private advantage may create some difficulty in distinguishing them in the mind, but the distinction is clear and well settled, and the process of separation of the rights and responsibilities attaching to the exercise of each is practicable.

B

The City of Worcester has a special proprietary right in the property of the defendant in error reserved to it in the original statute incorporating the Worcester Horse Railroad Company, Chap. 148 Mass. Laws of 1861.

Sections 12 and 13 of said act are as follows:

> Sec. 12. "The city of Worcester may, at any time during the continuance of the charter of said corporation, and after the expiration of ten years from the opening of any part of said road for use, purchase of said corporation all the franchise, property, rights, and furniture of said corporation, by paying therefor such a sum as will reimburse to each person who shall then be a stockholder therein, the par value of his stock, together with a net profit of ten per cent. per annum from the time of the transfer of said stock to him on the books of the corporation, deducting the dividends received by said stockholders thereon.
>
> Sec. 13. This act shall be void, so far as relates to the right to construct said road in said city of Worcester, unless the same shall be accepted by the mayor and aldermen of said city of Worcester, and unless the same shall be accepted by said corporation, and unless said road shall be located within two years from the passage of this act."

This right of purchase has followed through the mutations in name of the company, each successive statute providing that the new named company should possess the franchise of the earlier named company, with all its powers and privileges, and be subject to all the duties, liabilities and restrictions of the old company. See chapter 141, Laws of 1867, chapter 356, Laws of 1869, both of which relate to the Worcester Street Railway, and chapter 284, Laws of 1887, which relates to the Worcester Consolidated Street Railway Company.

The original property right of the city of Worcester in the property of the street railway company was recognized by the requirement that the act incorporating the company and providing for the construction of the railway should be accepted by the representatives of the city. The reservation to the city of Worcester of the right of purchase may fairly be assumed to be constitutional and legal from the fact that the early acts of incorporation of street railway companies by the Legislature of Massachusetts all contained the reservation of purchase, thirty-six or more such acts having been passed between and including the years 1853 and 1868, in all of which substantially the same section as to purchase was inserted as in the Worcester statute. A schedule of these acts is printed as appendix C. of this brief.

No question has ever been raised as to the constitutionality of these statutes in the Supreme Judicial Court of Massachusetts, and in the only two cases where the subject-matter has been before the Court there has been no intimation that the section authorizing the purchase by the municipality was not a proper exercise of legislative authority, and did not confer rights upon the city.

Richardson vs. Sibley, 11 Allen, 65.
Cambridge vs. Cambridge Railroad Co., 10 Allen, 50.

The case of Richardson vs. Sibley relates to the Worcester Company, and the Court, speaking through Mr. Justice Gray, said, on pages 67 and 68, relating to such railways in general:

> "The main object of the Legislature in establishing such corporations, and granting to them the privilege of using the highways in a peculiar manner, is not a profit of the grantees, but the accommodation of the public. . . . . The right is given to the City of Worcester at any time during the continuance of the charter, and after ten years from the opening of any part of the road for use to 'purchase of said corporation all the franchise, property, rights and furniture of said corporation' at a certain rate."

The very presence of this provision implies that the City of Worcester has rights reserved in the property of the defendant in error, which are in the nature of a contract right, and which of itself imposes a duty upon the officers of the city to constantly guard its corporate interests, and at all times when dealing with the interdependent relations which exist between the municipality and the company, to have an eye unclouded by the arguments of temporary expediency and single to this most important and enduring right.

> See Boston & Albany Railroad vs. Cambridge, 159 Mass., 283 and 287.

This right of purchase by the City of Worcester of the franchise and other property of the defendant in error places the plaintiff in error upon a different ground in dealing with the defendant company as to grants of locations and otherwise, from that which it might occupy in dealing with a street railway company in which it had no rights especially reserved. This right by implication

carries with it powers in the city and limitations upon the company which would not otherwise exist.

Braintree Water Supply Co. vs. Braintree, 146 Mass., 482.

Rockport Water Co. vs. Rockport, 161 Mass., 279.

The existence of the right of purchase speaks with emphasis against any interference even by the Legislature with a voluntary agreement, freely entered into between the company and the city, respecting matters which cannot fail in the event of a purchase being made under the authority of the statute, to affect the price which the municipality might be obliged to pay for the property taken. While the city would have no right to complain of any general laws that might be passed by the Legislature relating to taxation of the property of the defendant in error and changing the basis, theory or details of such tax laws, yet the right of purchase is such a distinct property right upon which the city presumably may have been relying ever since the construction of street railways in the City of Worcester that any law sweeping away engagements made between the company and the city must affect the latter's property rights.

2.

As to Person.

A municipal corporation is a "person" within the meaning of that word as used in the Fourteenth Amendment to the Federal Constitution.

It has been decided that the word "corporation" as used in certain statutes, includes a municipal corporation.

This court said, in Loeb v. Trustees of Columbia Township, 179 U. S. 472, at page 486, in discussing the words "any corporation" as used in the judiciary act of August 13, 1888, c. 866 (25 statutes at large, 433-43, s. l.)

"It must therefore be taken that the words 'any corporation' in the act of 1888, include municipal as well as private corporations."

To the same effect:

Andes v. Ely, 158 U. S. 312;
1 Dillon on Municipal Corporations,
4th Edition, s. 18, 19 and 20.

The Massachusetts statute in force when these locations were granted (Mass. P. S., c. 3, s. 3, Cl. 16) enacted:

"Sixteenth. The word 'person' may extend and be applied to bodies politic and corporate."

Such is now the law of Mass. R. L. c., 8, sec. 5, Cl. 16.

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

Covington and L. Turnpike R. R. Co. v. Sandford, 164 U. S. 578—592.
Pembina Consolidated Silver Mining Co. vs. Pennsylvania, 125 U. S. 181.

3.

Whether the State of Massachusetts has by its legislation deprived this person of its property without due process of law involves the interpretation of the Mass. statute. This can more conveniently be discussed in connection with the question whether the statute has impaired the obligation of contract, which is the next general topic on this brief.

IV.

HAS THERE BEEN STATE LEGISLATION IMPAIRING THE CONTRACT OBLIGATIONS OR TAKING AWAY PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW?

It is contended by the plaintiff in error that by enacting chapter 578 of the laws of 1898 the legislature did not attempt or intend to either abrogate or impair any contract obligations then binding upon street railway companies under the provisions of existing laws or to sweep out of existence any property or property rights.

The material portions of c. 578, Massachusetts Laws of 1898 are as follows:—

> Section 1. * * "'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain and operate a street railway in a public highway or street in such city or town. And 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

Sects. 2 to 5, both inclusive, relate solely to taxation.

Sect. 6 requires a return to the assessors of each town and city of the length of track operated by it and its gross receipts.

Sect. 7 is as follows:—

> "Section 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein, an excise tax of an amount equal to such proportion of the following percentages

of the gross receipts of such company as the length of tracks operated by it in public ways of such city or town bears to the total length of tracks operated by it in public ways, to wit:—

"In case of companies whose annual gross receipts per mile of track operated are four thousand dollars or less, one per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than four thousand dollars and less than seven thousand dollars, two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The excise tax provided by this section shall be in addition to the taxes now provided by law."

Sect. 8 is as follows:—

"Section 8. At any time after the end of three years from the first day of October, in the year eighteen hundred and ninety-eight the selectmen of any town, or the aldermen of any city, or any street railway company operating in such town or city, may petition the board of railroad commissioners for a revision of the amount of the excise tax to be thereafter paid by said company under the preceding section; and said board shall there-

upon proceed to investigate and determine, after public notice, and a hearing at which said selectmen or aldermen and said company may submit such evidence as may be pertinent, the average annual cost to said town or city of the work done by it during the preceeding three years under the provisions of this act which by law it was not previously required to do, and also the average annual payments made by said company to said town or city under and pursuant to said section during said three years; and having ascertained and determined said average annual cost and average annual payments, said board shall thereupon determine and fix the proportion of the percentage of the gross receipts which shall be paid as an excise tax under said section by the company to said town or city annually thereafter, said proportion to be fixed at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act and which it was not by law previously required to do, as determined as aforesaid; and the proportion of the percentage so fixed shall not be again changed for the period of three years, and not, except in the manner herein provided. Said board may at any time upon petition therefor by any city or town entitled to any part of the excise tax paid by any street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company under the provision of this act, instead of the proportion based upon length of tracks as hereinbefore provided."

Sects. 9 and 10 relate to the collection and use of this excise tax.

Sect. 11 is as follows:—

"Section 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, *but they shall remain subject to all legal obligations imposed in original grants of locations*, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor." * * * * * * *

Sect. 12 relates to the clearing of snow from tracks and sect. 13, after providing for petition and notice upon the same for original location, continues :

Section 13. * * * * "In granting said location they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose *such other terms, conditions and obligations in addition to* those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location. * * * (Provisions as to protest of abutters and construction). * * * * * * "*All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of*

this section, and shall continue in force, subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act."

Sect. 14 relates to procedure in case of failure to obtain original location connecting two cities or towns.

"Section 15. The board of aldermen of a city or the selectmen of a town, upon the petition of fifty legal voters or the board of directors of a street railway company whose tracks are located in said city or town, and after notice and hearing as provided in section thirteen of this act, may grant a location for the extension of the tracks of such company and prescribe the manner in which said tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used; but they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of this act, or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage hereof. The provisions of section thirteen of this act as to acceptance, and as to protest of abutters and approval by the board of railroad commissioners, shall apply to grants of extensions under this section."

Sect. 16 relates to alteration of location.

Sect. 26 repeals sects. 7, 21, 23, 27, 32, 44 and 45 of c. 113, Public Statutes of Massachusetts.

Section 26 of said chapter 578 repeals sections 21, 32, 44, and 45 of chapter 113 of the Public Statutes already referred to, also section 7 providing for the grant of original locations, sections 22 to 24 providing for the alteration and revocation of locations, and so much of section 27 as relates to the removal of snow and ice.

The Supreme Judicial Court of Massachusetts in the Springfield case (which is referred to in the opinion in the cases at bar for the discussion of the constitutional principles) said, — "If there is a contract, as the plaintiff contends, which we do not intimate, it would seem to be between the plaintiff and the defendant, and the plaintiff would seem to be the proper party to enforce it." . . . . We also assume without deciding that the conditions were lawfully imposed." . . . . (Then referring to ss. 4, 7, 10, 11 and 26 of c. 578, Mass. Laws of 1898, the court proceeds to say)— "There can be no doubt, we think, that if the provisions to which we have referred stood alone, the effect of the statute would be to abrogate the conditions on which the location was granted." . . . . (Then after a further discussion of the sections of the statute, the court concludes that portion of the discussion by saying)— "We think, therefore, as already observed, that the statute abrogates the conditions relied on."

Where, as in the case at bar, the validity of the state statute was attacked upon the very ground that it was in conflict with the contract clause of the federal constitution, and also in conflict with the fourteenth amendment of the federal constitution, this court examines *de novo* the meaning of the statute and places its own interpretation upon it without regard to the determination of the state court.

Referring to the contention that this court was not bound by the construction placed upon state statute by the decision of the highest court of the state, this court said in McCullough vs. Virginia: 172 U. S. 102, at pp. 109 and 110:—

> "It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the court of appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a

state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in Jefferson Branch Bank v. Skelly, 1 Black, 436, 443 [17: 173, 177], in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, or is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, when ever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 145 [17: 571, 576]; Wright v. Nagle, 101 U. S. 791, 793 [25: 921, 922]; McGahey v. Virginia, 135 U. S. 665, 667 [34; 305, 306]; in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question is raised,

whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the perogative of this court under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.' See also Douglas v. Kentucky, 168 U. S. 488, 501 [42: 553, 557], and cases cited therein".

In Yick Wo v. Hopkins, 118 U. S. 356, this court speaking through Mr. Justice Matthews, after stating that the question whether the imprisonment of a plaintiff in error was legal under the Constitution and laws of the state was not open in this court, said:—

"That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

In Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 486, speaking through Mr. Justice Jackson, the court says:

"It is contended by counsel for defendants in error that this court is without jurisdiction to review the judgment of the supreme court of Tennessee, because it was based, or proceeded, upon the ground that there was no contract in existence between the railroad company and the state to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In support of this proposition there are cited Mississippi & M. R. Co. v. McClure, 10 Wall, 515; Boyd v. Alabama, 94 U. S. 645; Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174; and New Orleans v. New Orleans Water Works Co. 142 U S. 79.

These decisions need not be specially reviewed, for they clearly do not apply to the case under consideration. It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this."

In Wilson v. Standefer, 184 U. S. 399, at pp. 411 and 412, the court, speaking through Mr. Justice Shiras, says: —

"We are first confronted with a question of construction. The supreme court of Texas having held that s. 12 was a law, and not a term of contract with a purchaser, is it open for this court to put a different construction upon the statute? It is settled law that this court, when reviewing the final judgment of a state court, upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation had been impaired by the state enactments. Jefferson Branch Bank v. Skelly 1 Black, 436; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486; Chicago, B. & Q. R. Co. v. Nebraska ex. rel. Omaha, 170 U. S. 58 McCullough v. Virginia, 172 U. S. 102."

1.

Prior to the passage of chapter 578 street railway companies were required under the provisions of section 32 of said chapter 113 to keep certain portions of the surface material of streets in repair regardless of whether they were bound so to do by the terms of their locations; and the provision of section 11 of said chapter 578 that "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations" was intended to show that the repeal of said section 32 of chapter 113 applied both to existing and to future locations only in cases where there was no condition in the location requiring the company to repair; excepting, however, as appears from section 15 of chapter 578, that if the original grant of a location to a company subsequent to the passage of chapter 578 did not contain a condition requiring repairs then no grant thereafter made to the same company could contain such a condition.

That the proviso that "they shall remain subject to all legal obligations imposed in original grants of locations" refers only to original grants subsequent to the passage of the act, is apparent from a careful consideration of section 11 together with section 13 which provides that the municipal board in granting a location may also impose such "other terms, conditions and obligations, *in addition to those applying to all street railways under the general provisions of law*, as the public interest may in their judgment require," and with section 15 which provides that "they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of the act, or such as may have been imposed in the

original grant of location to such company in such city or town *subsequent to the passage hereof.*"

Section 1 of chapter 578 says, "An original location of a company in any city or town shall mean the first location granted to it in such city or town." But a "grant of an original location" is not the same thing as an "original grant of a location" for the former means the first location of a company in a city whether granted *before or after* the enactment of chapter 578, while the latter means the first location of a company in a city granted *after* the passage of chapter 578, and this distinction is maintained throughout all the provisions of the chapter.

If the words "original grant of location" as used in section 15 be held to mean "grant of original location" as "original location" is defined in section 1 then there is no provision whatever made in the act for the granting of extensions where the original location was granted *before* the passage of the act.

Furthermore, if the words "original grants of locations" in section 11 were held to refer to grants of original locations before the passage of the statute, then the legislature must have intended to preserve the obligation of companies contained in the first grant of a location made when the company was in its infancy and the whole subject of the relation of the company to the city or town a science quite unknown in municipal administration, which might cover two or three or half a dozen of streets, and abrogate the obligations contained in succeeding extensions which might cover scores of streets. Entirely aside from the question of the constitutionality of such a provision there is no conceivable reason why the legislature should make or could have intended to make, any such distinction.

Another sufficient reason for the use of the words is found in applying them to grants subsequent to the

passage of the act, for if the clause providing that "they shall remain subject to all legal obligations imposed in original grants of locations" had not been inserted then it might well have been argued that the preceding clause providing that "street railways shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," was intended not only to relieve the railway company from repairs on streets where its tracks had already been laid under locations containing no condition requiring repairs, but also to prevent the company being required to repair by any condition in a future location, original or otherwise, which, of course, was not the case.

Section 13 of chapter 578 gives the municipal board power (in addition to prescribing the manner of laying the tracks, and the kind of rails, poles, wires and other appliances to be used), to impose as terms and conditions *of the location* not only the obligations imposed under general provisions of law but also any other obligations that the public interest may in their judgment require. In view of the unrestricted discretionary power here given to municipal boards, the legislature would have been careful to specify that the repair of surface material of streets should not be required *by the terms of any future location* if such had been its intention.

The clause "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but shall remain subject to all legal obligations imposed in original grants of locations" means simply that in the absence of any condition in any *prior* or *future* location, or of any contract between the parties, requiring the railway company to make repairs, then in such case the statute says the obligation shall rest upon the city, instead of

upon the company as provided by section 32 of chapter 113.

The last paragraph of section 13 which provides that "All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section, and shall continue in force, subject only to revocation as provided in section 17, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force, except so far as changed or modified by this act," makes still clearer the intention of the legislature that all prior locations shall be left unaffected by the passage of the act, except as to the power of revocation which is made subject to the approval of the board of railroad commissioners, and excepting the modifications in the provisions of the general law, that is, the legislature makes such changes as it deems best in the provisions, restrictions, regulations and conditions prescribed by the general law, which are, of course, entirely within its power, while it professes to make no change in the terms or conditions of the locations themselves, but expressly ratifies and confirms them.

It is apparent also upon a careful examination of sections 7 and 8 of said chapter 578, that the excise tax provided for in section 7 was intended to reimburse the municipality for the cost "of work done by it . . . under the provisions of this act which *by* LAW it was not previously required to do," and there is no provision which requires or implies or suggests that after the passage thereof the municipality is to do any work from which it was previously exempt *by the terms of a location or other contract.*

And this must be so for if it was intended that the tax should cover the cost of work from which the city was previously relieved by location contracts as well as by

law, that would include the expense of block paving throughout the width of the street --- that is, if we suppose those contracts to be abrogated by chapter 578 as is contended by the respondent; while if its contention that future location contracts as to repairs are forbidden is also correct, then as to locations granted after the passage of the act there would be no definite basis of computation, because as to such locations you could not tell from how much the municipality would have exempted itself if it retained the same right to impose location conditions relating to repairs that it had before the passage of the act of 1898.

On the other hand if "by law" means statutory provisions, the basis and method of computation is simple both as applied to past and to future locations; and no injustice is done the railway companies, if they are still required to make repairs in accordance with location conditions, either past or future, because the amount of the cost to the city on account thereof, for which it might be compensated under sections 7 and 8, would be reduced just so much, and if the municipality were put to no additional cost because of the passage of chapter 578, then after the expiration of three years there would be no excise tax; the result of it all being to leave the railway companies and municipalities free to contract, by location conditions or otherwise, as to the care of streets, while under the old provisions of chapter 113 the railway companies were obliged by *law* to make certain repairs regardless of location conditions.

2.

Whatever may be the interpretation given to the first sentence of s. 11 of said c. 578, as to whether it applies only to future locations granted under the provisions of that act, or whether it applies to all prior locations, nevertheless the concluding sentence of s. 13 ratifies

and confirms all locations heretofore granted and preserves all the conditions in locations which it is contended are valid in these proceedings. That sentence defines the status of all locations heretofore granted or in use and ratifies and confirms them to all intents and purposes, and then states that they shall continue in force, "subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act".

In order to construe that paragraph as eliminating all conditions other than those applicable to all street railways, it is necessary to apply the word "only" to all the language which follows. This, however, does not seem a reasonable construction of the statute, in view either of its sense or of its punctuation. But it would appear that the old locations were subject only to be revoked in accordance with the seventeenth section of the statute of 1898, and that they also shall be subject to all provisions, restrictions, conditions and regulations of the general law without any terms providing that the lawful conditions annexed to their original locations shall be abrogated or abridged.

The history of said c. 578 may throw some light upon the construction to be given to this clause. In his inaugural message of 1897, the then Governor Wolcott called the attention of the Legislature to the subject of street railways and their relations to cities and towns, in the following language:

> "The essential difference between street railway companies and railroad corporations lies in the fact that the former have the right to use, in common with other citizens, the public highways, whereas the latter have the exclusive use of their road beds. In contemplation of law this right to use the public ways is granted such companies on the

sole ground that it is for the 'interest of the public' that they be allowed so to do; this phrase recurring repeatedly in the statutes authorizing boards of aldermen in cities and the selectmen of towns to grant, refuse, extend and revoke locations. In theory therefore the granting of a location is an accommodation to the public, and not a privilege or gift to the railway company; the franchise being granted solely for the convenience of all the citizens as a method of affording cheap and convenient transportation over public ways. Upon this theory, if it is found that the right of thus using the streets is profitable beyond a moderate return upon the capital actually invested, it is just to require that the fares be reduced or the service improved. If this remedy were proved in practice to be easy of application it would afford the best solution of a vexed problem. But this has not been found to be the case, and, in consequence, contrary to the theory of our existing law, these grants have often proved of great pecuniary value to the companies receiving them. This has led to a general demand that a direct return shall be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets, or by a percentage of receipts or profits. This can be justified only upon a different theory; namely, that a valuable right is granted to the company, and therefore is taken away from the public. If such a direct return is exacted it seems just, on the other hand, that the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility, or the lure of a higher bid from would-be competitors. It is possible that in some municipalities one of these conflicting theories might be more acceptable, whereas in others the public convenience might be better served by adoption of the other. Under existing legislation there is no authority to impose any tax whatever. I recommend that this authority be granted."

(Page 644, Mass. Acts and Resolves of 1897). C. 509, Massachusetts Laws of 1897, provided for the appointment of a committee by the Governor to investigate the subject of the relations between street railway and municipal corporations. S. 2 of that act was as follows:

"Section 2. The said committee shall forthwith proceed to investigate and consider the relations existing between cities and towns and street railway companies, the taxation of street railways and their franchises in this Commonwealth and in other states and countries, and *shall consider what legislation, if any, is needed to establish a more fixed tenure of franchises of street railways, and an equitable method of taxation thereof in this Commonwealth.*"

It is to be noted that this statute did not on its face require a report as to legislation, except upon two subjects.—*first, a more fixed tenure of locations,* and *second, an equitable method of taxation.* Of course, the Legislature of 1898 was not bound by the limitations contained in this section, but it is important as throwing a sidelight upon the interpretation to be given to a doubtful enactment following and based upon the report of that committee. That committee reported a bill which is House Document No. 475 of the year 1898. The section corresponding to section 11 was as follows:—

"Section 10. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair; but whenever the same is disturbed by reason of the original construction or subsequent alteration or extension of any railway, or by reason of any repairs or renewals of the railway or any part thereof, the company owning or operating such railway shall at its own cost renew and replace said surface material with the same form of construction, or with such other form as the superintendent of streets, or other officer exercising like powers, shall approve, and shall restore the same to as good condition as the same was at the time of such disturbance. Every street railway company shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect or misconduct of its agents or servants in the construction, alteration, extension, repair or renewal

of its railway, or in the renewal or replacing of the surface of the streets disturbed as aforesaid."

That corresponding to section 13 is as follows:

"Section 12. The board of aldermen of a city or the selectmen of a town, upon the petition for an original location of tracks in such city or town by the board of directors of a corporation organized under the provisions of sections two to six inclusive of chapter one hundred and thirteen of the Public Statutes, or under a special legislative act, shall give notice to all parties interested of the time and place at which they will consider such petition, at least fourteen days before the meeting of such board or selectmen for considering said petition, by publication in one or more newspapers published in said city or town, and if none such is published then by publication in one or more newspapers published in the county in which said city or town is located; and after hearing, if in their opinion public convenience and necessity require, they shall grant said location, or any portion thereof. In granting said location, they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations in addition to those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location.

If either the majority in value as determined by the last preceding assessment for taxation, or not less than ten in number, of those owning real estate abutting on any public way in which a location of a street railway has been granted shall, within thirty days after the granting of such location, file a written protest with the board of railroad commissioners, such location shall not be valid so far as such way is concerned until approved by the board of railroad commissioners after public notice and a hearing. No company shall commence construction under an order of a board of aldermen or of selectmen granting a location as aforesaid until the expiration of the time in which such protest may be filed with said board of railroad commissioners, nor, in case such protest is so filed, until said board of railroad commissioners has taken final action thereon approving the same."

The committee's note at the conclusion of this section is as follows:—

"[The first paragraph (lines 1-29) of section 12 modifies the existing law regulating the grant of locations only in so far as is necessary to make it conform to the interpretation of that law which has in practice grown up (see pages 22 and 23 of

the Report). The second paragraph (lines 30-46) is discussed, and grounds on which it is recommended are set forth, on page 25 of the Report]."

Pages 22 and 23 of the report are printed in this brief pp. 24, 25 and 26.

The committee on Street Railways, to whom the report of the committee of 1897 was referred, reported to the House a bill substantially in the form of the one prepared by the committee appointed as aforesaid by the Governor. Soon afterward the bill was amended in the House by adding in Section 11 after the provision that street railway companies should not be required to keep any portion of the surface material of streets, roads and bridges, in repair, the following words, "except as otherwise provided in the original grant of locations," and the said bill was likewise amended by adding at the end of section 13 the words before quoted and now in the Statute. The former amendment remained in the same form through all the stages of the passage of the bill, in which the bill was amended in various places, until near the time of its enactment, when the words now found in section 11 of the Statute were substituted, and the bill enacted in that form. As the bill was reported by the Committee of 1897, the intent was very clear to exempt all street railway companies from any liability to repair the surface material of the ways.

The only inference to be drawn from these amendments tacked on to these vital sections is that the Legislature intended to preserve all obligations, which had theretofore been regarded as a subsisting liability on the part of the street railway company.

Ss. 13 and 15, c. 578 of the Laws of 1898, make clear beyond the peradventure of a doubt the authority of the local boards to impose the obligation upon a new company applying for a location to keep the whole or any part of the street through which the tracks run in

repair. The argument that said c. 578 intends an abrogation of all conditions contained in all extensions of locations inevitably leads to the conclusion that the Legislature of Massachusetts intended to protect and preserve then existing street railway companies to the extent practically of monopolizing desirable locations, to the exclusion of all new companies. The older the company the more reasonable it may be to infer that the lighter were the obligations imposed in original locations. Therefore, such old and well established companies in centers of population, where the traffic may be presumed to be much more heavy and profitable than in the routes still open for occupation in 1898, if relieved of all obligations in extensions of locations respecting paving, have opportunities for profit conserved to them by express legislation, of which companies incorporated after 1898 may be utterly deprived by the act of the local boards in granting new locations. Such a deliberate intention on the part of any Legislature is inconceivable, and such an interpretation of any act of the Legislature should not be given unless no other reasonable construction can be placed upon it.

If, however, the statute means what the defendant in error contends and what the Supreme Judicial Court of Massachusetts determined that it meant, it both impairs the obligation of the contract between the plaintiff in error and the defendant in error, and deprives the plaintiff in error of its property without due process of law.

V.

AS TO FORM OF REMEDY.

It is probable that under the terms of the reservations in the two petitions for writs of mandamus, numbers 144 and 146 no question is open, or will be considered by this court as to the form of remedy. It is perhaps also entirely a matter of state practice with which this court would not concern itself.

1. Upon general principles of procedure, it would seem that mandamus is the proper remedy.

Cambridge & Somerville vs. Charlestown Branch R. R. Co. 7 Met., 70.

This is held in numerous cases to be a proper form of remedy.

N. P. R. R. Co. vs. Washington, 142 U. S. 492.

Township of Grosse Pointe vs. Detroit &c. St. R. R. Co., 90 N. W. Rep. 42.

People vs. Suburban R. R. C., 378 Ill. 594, 598.

2. The practice in Massachusetts since the decision of the cases at bar by the state court seems to be in favor of the proceedings in equity, either under general chancery procedure or under the special terms of the statute.

Gardner vs. Templeton St. Ry. Co., 184 Mass. 294.

Newcomb vs. Norfolk Western St. Ry. Co., 179 Mass. 449.

3. Contract lies for work done by the city, which was required by the conditions, and which the company refused to do.

Indianapolis & Cincinnati R. R. Co. vs. Lawrenceburg, 34 Ind. 304.

State vs. J. S. R. R. Co., 29 Fla. 590.
Fresno vs. Fowler Canal Co,. 68 Cal. 359.
Detroit vs. Fort Wayne &c. R. R. Co., 95 Mich. 456.
Booth on Street Railways, sec. 261 and cases cited.
City of Newport vs. South Covington & Cincinnati St. Ry. Co., 89 Ken., 29.

Respectfully submitted,

ARTHUR P. RUGG,
Counsel for Plaintiffs in Error

JOHN R. THAYER,
of Counsel.

APPENDIX A.

C. 148, MASS. LAWS OF 1861.

AN ACT
TO INCORPORATE THE WORCESTER HORSE RAILROAD COMPANY.

Be it enacted, &c., as follows:

Section 1. Albert Curtis, Loring Coes, William H. Heywood, John C. Mason, Frederic W. Paine, Joseph Sargeant, and James H. Wall, their associates and successors, are hereby made a corporation by the name of the Worcester Horse Railroad Company, with power to construct, maintain and use a railway, with convenient single or double tracks, from such point or points on Main Street, in the city of Worcester, as shall be from time to time fixed by the mayor and aldermen of said city, with the assent, in writing, of said corporation, filed in the office of the city clerk of said city; then upon and over such street or streets, and such highway or highways, as shall be designated by a vote of the mayor and aldermen of said city.

Section 2. The corporation hereby created, in crossing all the branches and lateral tracks of any other railroad company, shall cross in such a manner as not to injure any of the said tracks or branches, and the rails thereof, and shall insert no frogs therein, and make no incisions into the rails thereof without the consent of said company, but shall cross the same as the Watertown branch of the Fitchburg Railroad Company is now crossed in Watertown, by the Waltham and Watertown Railroad Company, unless some other arrangement shall be made between said companies.

APPENDIX A. Continued.

Section 3. Said tracks or roads shall be operated and used by said corporation with horse-power only. The mayor and aldermen of the city of Worcester shall have power, at all times, to make all such regulations, as to the rate of speed and mode of use of the tracks, as the public safety and convenience may require.

Section 4. Said corporation shall keep and maintain in repair such portion of the streets and highways respectively, as shall be occupied by their tracks, and shall be liable for any loss or injury that any person may sustain, by reason of any carelessness, neglect or misconduct of any of its agents and servants in the management, construction or use of said roads, tracks or highways; and in case any recovery shall be had against said city of Worcester, by reason of such defect or want of repair, said corporation shall be liable to pay to said city of Worcester any sums thus recovered against said city, together with all costs and reasonable expenditures, incurred by said city in the defence of any such suits, in which recovery may be had; and said corporation shall not use any portion of the streets or highways not occupied by said road or tracks.

Section 5. If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the common jail for a period not exceeding three months.

Section 6. If said corporation, or its agents or servants, shall wilfully and maliciously obstruct any highways, or the passing of any carriages over the same, such corporation shall be punished by a fine not exceeding five hundred dollars.

APPENDIX A. Continued.

Section 7. The capital stock of said corporation shall not exceed one hundred thousand dollars, to be divided into shares of one hundred dollars each.

Section 8. Said corporation shall have power to purchase and hold such real estate within said city of Worcester, as may be convenient or necessary for the purposes and management of said road.

Section 9. The said road shall be constructed and maintained in such form and manner, and upon such grade as the mayor and aldermen of said city of Worcester may in their votes, fixing and determining the routes thereof, as aforesaid, prescribe and direct; and whenever in the judgment of said corporation it shall be necessary to alter the grade of any street so occupied by it, such alteration may be made at the sole expense of said corporation: *provided,* the same shall be assented to by the mayor and aldermen of said city of Worcester.

Section 10. Nothing in this act shall be construed to prevent the mayor and aldermen of said city from entering upon and taking up any of the public streets or highways traversed by said railroad, for any purpose for which they may now lawfully take up the same.

Section 11. At any time after the expiration of one year from the opening for the use of the tracks of said railroad in any street or road in which the same shall be located, as provided by its charter, the mayor and aldermen of the city of Worcester may determine as to so much of said tracks as is located with said city, that the same, or any part thereof, be discontinued; and thereupon the location shall be deemed to be revoked, and the tracks of said railroad shall forthwith be taken up and removed, in conformity with the order of said mayor and aldermen of the city of Worces-

ter; and such taking up and removal shall be at the expense of said railroad corporation.

Section 12. The city of Worcester may, at any time during the continuance of the charter of said corporation, and after the expiration of ten years from the opening of any part of said road for use, purchase of said corporation all the franchise, property, rights, and furniture of said corporation, by paying therefor such a sum as will reimburse to each person who shall then be a stockholder therein, the par value of his stock, together with a net profit of ten per cent. per annum from the time of the transfer of said stock to him on the books of the corporation, deducting the dividends received by said stockholders thereon.

Section 13. This act shall be void, so far as relates to the right to construct said road in said city of Worcester, unless the same shall be accepted by the mayor and aldermen of said city of Worcester, and unless the same shall be accepted by said corporation, and unless said road shall be located within two years from the passage of this act.

Section 14. Said corporation shall be deemed a railroad corporation, so far as to be subject to make such annual returns to the legislature as are, or may be prescribed by law; and also so far as to be subject to all existing provisions of law for the assessment and payment of damages for the land outside of the streets and highways taken by them for tracks; and to all general provisions of law that are, or may be, prescribed relative to horse or street railroads.

Section 15. This act shall take effect upon its passage.

Approved April 6, 1861.

APPENDIX B.

C. 181, MASS. LAWS OF 1866.

AN ACT
TO INCORPORATE THE COHASSETT AND SCITUATE STREET RAILWAY COMPANY.

Be it enacted, &c., as follows:

Section 1. Joseph O. Cole, John D. Nichols, Nathaniel H. Whiting, their associates and successors, are hereby made a corporation, by the name of the Cohasset and Scituate Street Railway Company, for the purpose of constructing and using a street railroad from some convenient point near the depot of the South Shore Railroad, in the town of Cohasset, to some convenient point in that part of the town of Scituate called Scituate Harbor; with all the powers and privileges, and subject to all the duties, liabilities and restrictions set forth in all general laws which now are or may hereinafter be in force relating to street railroads.

Section 2. The capital stock of said corporation shall not exceed the sum of seventy-five thousand dollars, to be divided into shares of one hundred dollars each.

Section 3. This act shall take effect upon its passage.

Approved April 25, 1866.

APPENDIX C.

SCHEDULE OF SPECIAL ACTS OF INCORPORATION OF STREET RAILWAY COMPANIES PASSED BY THE LEGISLATURE OF MASSACHUSETTS BETWEEN 1853 AND 1871, BOTH INCLUSIVE (THE STATUTES AUTHORIZING PURCHASE BY MUNICIPALITIES ARE INDICATED BY REFERENCE TO SECTIONS .

PART I*

See

Metropolitan Railroad Co., Laws of 1853, chap 353, sec. 7.

Cambridge Railroad Co., Laws of 1853, chap. 383, sec. 7.

Western Avenue Railroad Co., Laws of 1854, chap. 446, sec. 7.

Broadway Railroad Co., Laws of 1854, chap. 444, sec. 7.

Dorchester Avenue Railroad Co., Laws of 1854, chap. 435, sec. 7.

Metropolitan Railroad Co., Laws of 1854, chap. 94, sec. 4. (in addition to an act to incorporate.)

Middlesex Railroad Co., Laws of 1854, chap. 434, sec. 3.

Boston & Chelsea Railroad Co., Laws of 1854. chap. 445, sec. 9.

Medford & Charlestown Railroad Co., Laws of 1855, chap. 336. sec. 3.

Waltham & Watertown Railroad Company, Laws of 1855, chap. 408, sec. 8.

Newton Railroad Company, Laws of 1857, chap. 278, sec. 7.

Suffolk Railroad Company, Laws of 1857. chap. 285, sec. 13.

*These statutes all authorize purchase of the street railway company by the municipality.

APPENDIX C. Continued.

West Roxbury Railroad Company, Laws of 1856, chap. 201, sec. 7.

Brookline Railroad Company, Laws of 1857, chap. 304. sec. 12.

Dorchester & Roxbury Railroad Co., Laws of 1857, chap. 256, sec. 7.

West Cambridge Horse Railroad Co., Laws of 1857, chap. 242, sec. 7.

Winnisimmet Railroad Company, Laws of 1857, chap. 227, sec. 8.

West Roxbury Railroad Co., Laws of 1857, chap. 230, sec. 7, (in addition to an act to incorporate.)

Chelsea Beach Railroad Company, Laws of 1858, chap. 29, sec. 9.

West Roxbury Railroad Company, Laws of 1858, chap. 38, sec. 8. (in addition to an act to incorporate.)

Dorchester Extension Railway, Laws of 1859, chap. 43, sec. 8.

Melrose & So. Reading Railroad Co., Laws of 1860, chap. 35, sec. 12.

Stoneham Street Railroad Company, Laws of 1860, chap. 19, sec. 12.

Belmont Horse Railroad Company, Laws of 1861, chap. 90, sec. 14.

Dedham & West Roxbury Railroad Co., Laws of 1861, chap. 135, sec. 14.

Quincy Railroad Company, Laws of 1861, chap. 48, sec. 9.

Salem & So. Danvers Railroad Co., Laws of 1861, chap. 63, sec. 12.

Winthrop Railroad Company, Laws of 1861, chap. 89, sec. 13.

Worcester Horse Railroad Company, Laws of 1861, chap. 148, sec. 12.

APPENDIX C. Continued.

Lowell Horse Railroad Company, Laws of 1863, chap. 172, sec. 11.

Melrose & So. Reading Horse R. R. Co., Laws of 1863, chap. 170, sec. 12.

Merrimack Valley Horse Railroad Co., Laws of 1863, chap. 207, sec. 12.

Springfield Horse Railroad Co., Laws of 1863, chap. 121, sec. 12.

Union Freight Horse Railroad Co., Laws of 1863, chap. 241, sec. 7.

Newburyport & Amesbury Horse R. R. Co., Laws of 1864, chap. 53, sec. 11.

Chelsea & East Boston Street R. R. Co., Laws of 1865, chap. 199, sec. 5.

Springfield Street R. R. Co., Laws of 1868, chap. 63, sec. 4.

PART II*

Cambridgeport Railroad Co., Laws of 1855, chap. 415.

Dorchester Avenue Railroad Co., Laws of 1855, chap. 201, (in addition to an act to incorporate.)

Dorchester Avenue Railroad Co., Laws of 1856, chap. 66, (in addition to an act to incorporate.)

Malden & Melrose Railroad Co., Laws of 1856, chap. 302.

Somerville Horse Railroad Co., Laws of 1857, chap. 250.

Cliftondale Railroad Co., Laws of 1859, chap. 144.

Lynn & Boston Railroad Co., Laws of 1859, chap. 202.

Cliftondale Railroad Co., Laws of 1860, chap. 17, (in addition to an act to incorporate.)

*These statutes do not authorize purchase by municipality.

APPENDIX C. Continued.

Charlestown Freight Railroad Co., Laws of 1861, chap. 15.

Duxbury Railroad Co., Laws of 1861, chap. 147.

South Danvers & Lynn Street Railway Co., Laws of 1864, chap. 252.

Northampton & Williamsburg Street Railway Co., Laws of 1865, chap. 128.

Brookline & Back Bay Street Railway Co, Laws of 1866, chap. 240.

Cohasset & Scituate Street Railway Co., Laws of 1866, chap. 181.

Commercial Freight Railway Co., Laws of 1866, chap. 267. (freight only).

Duxbury Street Railroad Co., Laws of 1866, chap. 155.

New Bedford Street Railroad Co., Laws of 1866, chap. 156.

North Woburn Street Railroad Co., Laws of 1866, chap. 108.

Waltham & Newton Street Railroad Co., Laws of 1866, chap. 214.

Marginal Freight Railway Co., Laws of 1867, chap. 170, (freight only.)

Northampton, Hadley & Amherst Street Railway Co., Laws of 1867, chap. 90.

Worcester Street Railway Co., Laws of 1867, chap. 141.

Albany Street Freight Railway Co., Laws of 1868, chap. 97, (freight only.)

Arlington & Lexington Street Railway Co., Laws of 1868, chap. 40.

Graves End Branch Street Railway Co., Laws of 1868, chap. 22.

Newburyport & Plum Island Street Railway Co., Laws of 1868, chap. 90.

APPENDIX C. Continued.

Nonantum Horse Railroad Co., Laws of 1868, chap. 151.

South Boston Freight Railway Co., Laws of 1868, chap. 175, (freight only.)

Springfield Street Railway Co., Laws of 1868, chap. 63, sec. 4.

Westfield Street Railway Co., Laws of 1868, chap. 148.

Boston & Lynn Union Railway Co., Laws of 1869, chap. 397.

Hyde Park Branch Railway Co., Laws of 1869, chap. 280.

Merrimack Street Railway Co., Laws of 1870, chap. 320.

Taunton Street Railway Co., Laws of 1870, chap. 18.

Worcester & Shrewsbury Street Railway Co., Laws of 1870, chap. 233.

Everett & Chelsea Street Railway Co., Laws of 1871, chap. 132.

FILED
JAN 24 1905
JAMES H. McKENNEY,
Clerk.

That boards of aldermen in Massachusetts have no authority in granting locations to a street railway company to enter into any contract in behalf of their respective cities with the street railway company, was decided by the supreme judicial court of Massachusetts in the case of

Cambridge *vs.* Cambridge R. R. Co. *et al.*,

the facts of which case are set out on page 25 of this brief.

The language of the court on this point is as follows:

"Certainly no right or authority * * * to enforce any supposed agreement or condition is vested in the mayor and aldermen, under the general powers and duties devolved on them by law, as officers acting for the city. Nor is there any such right or authority vested in them by the acts incorporating the defendants."

Then comes passage quoted on page 24 of this brief:

"But we look in vain for any provision of law which authorizes them to act in behalf of the city, *either in making any contracts with the defendants*, or in enforcing in their names or in their official capacity, any contract created by law, with the city or the public, under the acts incorporating the defendants. If the conditions on which the location of the road or any part of it was granted to the defendants can be properly regarded as a contract—a point not necessary now to determine—it was not one to which the mayor and aldermen were a party or which they are capable of enforcing."

"The provisions of St. 1864, chapter 229, sections 20, 45, confer no power on the mayor and aldermen to maintain this bill."

Cambridge *vs.* Cambridge R. R. Co. *et al.*, 10 Allen, 50.

Supreme Court of the United States.

OCTOBER TERM, 1904.

FILED
JAN 20 1905

No. 144.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

In Error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

No. 145.

SAME *v.* SAME.

In Error to the said Supreme Judicial Court.

No. 146.

CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the Superior Court of the Commonwealth of Massachusetts.

No. 147.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

SAME.

In Error to the said Superior Court.

No. 148.

CITY OF WORCESTER AND BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the said Superior Court.

BRIEF OF DEFENDANT IN ERROR.

BENTLEY W. WARREN, *Counsel.*

Press of Geo. H. Ellis Co., Boston.

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Supreme Court of the United States.

October Term, 1904.

No. 144.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

In Error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

No. 145.

SAME *v.* SAME.

In Error to the said Supreme Judicial Court.

No. 146.

CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the Superior Court of the Commonwealth of Massachusetts.

No. 147.

CITY OF WORCESTER, PLAINTIFF IN ERROR,

v.

SAME.

In Error to the said Superior Court.

No. 148.

CITY OF WORCESTER AND BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

v.

SAME.

In Error to the said Superior Court.

STATEMENT OF THE CASES.

These five cases arise on writs of error, directed by the Supreme Court of the United States in the case of the first two to the Supreme Judicial Court of the Commonwealth of Massachusetts, and in the case of the last three to the Superior Court of said Commonwealth. The first two cases were petitions for writs of mandamus originally brought in said Supreme Judicial Court of Massachusetts, sitting in the County of Worcester, and, upon a hearing before the chief justice of said Court upon the petitions and demurrers, were reserved for the determination of the full court. Of the three other cases, two were bills in equity originally brought in the Superior Court for the County of Worcester, and were heard upon the bills and demurrers thereto by a single justice, who sustained the demurrers. The City of Worcester appealed from both decrees to the Supreme Judicial Court. The fifth case was an action of contract originally brought in said Superior Court for the County of Worcester. The defendant demurred, and, upon a hearing, said court sustained the demurrer, and ordered judgment for the defendant, from which judgment the plaintiff appealed to the Supreme Judicial Court. All five cases were heard, argued, and decided together in the Supreme Judicial Court, and that Court, in a single opinion covering the five cases, affirmed the judgment of the Superior Court in the two equity suits and in the action of contract originally brought in that Court, and sustained the demurrers and dismissed the two petitions for writs of mandamus originally brought in the Supreme Judicial Court. All the cases, therefore, were decided in favor of the street railway company.

Said City of Worcester is a municipal corporation in the Commonwealth of Massachusetts, originally chartered by Acts 1848, chapter 32. This charter was revised by Acts 1866, chapter 199, and was again revised by Acts 1893, chapter 444

(approved June 9, 1893). All the orders of location set out or referred to in the five above entitled suits were made between the second and last general revisions of the charter of said city. Neither in the original charter and said general revisions of it, nor in the ninety-six special acts relating to the city and the ten special acts relating to the street railway company, passed by the legislature between February 29, 1848, the date of the approval of said original charter, and May 8, 1893, the date of the last of said orders, and between said last-mentioned date and the date of the bringing of these suits, can be found any special power conferred upon the city or any of its officers in any way making an exception in the case of said city to the general provisions of law which were from time to time, during the period between the incorporation of said city and the bringing of said five suits, in force in said Commonwealth regarding the power of boards of aldermen to authorize locations and extensions of street railways, and the capacity in which said power was to be exercised. The question, therefore, of the capacity in which the aldermen acted in authorizing the extensions of location involved in these suits, and the further question of the legal effect of their action, are to be answered without reference to any special statutes, and the necessity of considering such special statutes is eliminated from the cases.

The Worcester Consolidated Street Railway Company is a street railway corporation organized and doing business under the laws of the Commonwealth of Massachusetts, and at the several dates when these actions were commenced owned and operated in the City of Worcester and in numerous outlying cities and towns a street railway system parts of which had previously belonged to other similar corporations and had been acquired by said Worcester Consolidated Street Railway Company in the year 1901 by purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of said Commonwealth. Prior to such acquisition said Company, under the same name, had

owned and operated a street railway in said City of Worcester and in certain towns near said city since the year 1887, in which year (Acts and Resolves of Mass., 1887, chap. 284) the Citizens' Street Railway Company purchased the franchise, rights, and property of the Worcester Street Railway Company, each owning and operating a street railway in said City of Worcester; and the name of the purchasing company was changed to Worcester Consolidated Street Railway Company. Several years after this purchase by the Citizens' Street Railway Company, of the property of the Worcester Street Railway Company, and after said change of name, said Worcester Consolidated Street Railway Company was authorized by the Board of Aldermen of said City of Worcester, acting under authority of section 21 of chapter 113 of the Public Statutes of said Commonwealth, to extend the location of its tracks in said city.

The several orders of said Board of Aldermen authorizing said extensions of location are set out or referred to in the pleadings in one or more of said five suits, and certain provisions of these orders form the basis of said suits. The dates of these orders and the streets in which the extensions of the defendant's railway were authorized were as follows:—

(1) May 11, 1891. "From its present tracks in Front Street and Washington Square through and over Washington Square to Shrewsbury Street, through and over Shrewsbury Street to Belmont Street, and through and over Belmont Street to a point opposite the centre of Lake Avenue, with the right to use horses or electricity as a motive power."

(2) April 10, 1893. "Beginning at a point in Trumbull Street at its intersection with the northerly line of Park Street, thence crossing Trumbull Square and continuing southerly along Green Street to Millbury Street, thence southerly along Millbury Street to the terminus of the present track at Greenwood Street."

(3) April 10, 1893. "Beginning at a point on the easterly line of Park Avenue at its intersection with Pleasant Street,

thence westerly crossing said Park Avenue and continuing westerly and northerly along said Pleasant Street to the southerly line of June Street."

(4) April 24, 1893. "Beginning at the end of the present double track in said Pleasant Street at West Street, thence westerly along said Pleasant Street to the easterly line of Park Avenue."

(5) April 24, 1893. "Beginning at the present location of said Company's tracks in Front Street, thence easterly across Washington's Square to Shrewsbury Street, thence easterly along Shrewsbury Street to Belmont Street, thence easterly along Belmont Street to Plantation Street."

(6) May 8, 1893. "Beginning at the present tracks in Salisbury Street, thence northerly along Grove Street to Park Avenue, thence northerly along Park Avenue to the end of the present track at Chadwick Square."

Each of the extended locations, authorized by said orders, was accepted by the defendant company in accordance with said section 21 of chapter 113 of the Public Statutes. There was annexed by said Board of Aldermen to said authority contained in each of said orders certain requirements therein set forth and designated "conditions," one of which requirements in every order related to paving or other work to be done in or upon the streets in which, by such order, the Company was authorized to extend its tracks. These so-called conditions vary somewhat in the different orders, but in every instance the Company was required to perform, in connection with the constructions of its tracks upon the extended locations, a great amount of original street work; and was further required, in every instance except one, to maintain in proper condition and repair at all times thereafter a far greater portion of the surface material of the streets in which such extended locations had been authorized than was required by the provisions of the general laws in force at the dates of the several orders authorizing such extensions of location. (See P. S., chap. 113, sect. 32.) In the one instance excepted above, the portion of the street surface to be maintained by the Company was the same as that required by the general laws.

The exact requirements, however, of the various conditions are unimportant in the present cases. The so-called condition, annexed to the order referred to in paragraph numbered 2 above, is typical of all the other conditions relative to maintenance and repair of streets, and illustrates the nature of the alleged obligations upon which are based all the suits before this Court. This condition was relied on in one of the two petitions for mandamus, in one of the two suits in equity, and in the third count in the action of contract, and is in the following form:—

"Second. That said Company shall lay and maintain block paving over and upon said location and streets, as follows: In Green Street from the Boston & Albany railroad tracks to Vernon Square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon Square between the rails and tracks and outside of the tracks on the westerly side of said location to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury Street. In Millbury Street from Vernon Square to the bridge at Quinsigamond, crossing the Blackstone River between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said Company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury Street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury Street the highway department of the City of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said Company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said Company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said com-

mittee and the expense of such repairs shall be paid by the said Company."

The order containing this so-called condition is set out in full in the Transcript of the Record in two of the cases before this Court; namely, the petition for mandamus, No. 144, and the bill in equity, No. 146.

No question is raised in any of these cases as to whether or not the Company satisfactorily performed the work which the so-called conditions required it to do in connection with originally laying its tracks upon the extended locations, nor is any question raised as to whether the Company did or did not properly maintain the pavement and surface material of the various streets in accordance with the requirements of said conditions prior to the enactment by the Massachusetts legislature of the statute (Acts 1898, chap. 578) the constitutionality of which is assailed in these five cases.

Subsequent to the passage of said statute (Acts 1898, chap. 578) the plaintiff in error brought in the courts of Massachusetts the five suits the Record of which is now before this court. The city sought by one of the petitions for writs of mandamus (No. 144) and by one of the suits in equity (No. 146) to compel the Street Railway Company to continue to repair and maintain the surface of the streets mentioned in the paragraph above numbered (2), and by the other petition for a writ of mandamus (No. 145) and by the other suit in equity (No. 147) similar relief in relation to the streets mentioned in the paragraph above numbered 3; and these four suits, therefore, related to only two of the orders of location. The action of contract (No. 148) was brought to recover expenses incurred by the city in renewing and repairing various portions of the pavements or other surface material of certain of the streets mentioned respectively in each of the paragraphs above numbered 1, 2, 4, 5, and 6, because of the refusal of the Street Railway Company longer to maintain and repair such streets after the passage of said statute (Acts 1898, chap. 578).

These five cases can be considered together, as, notwithstanding the variation in the amount and kind of work required to be performed originally by the defendant and the amount and kind of surface material subsequently to be maintained in proper repair by the defendant, the cases present regarding each order, and the paving requirement therein contained, only the same questions, namely:—

First. In what capacity did the Board of Aldermen of the City of Worcester act in imposing the so-called "conditions" (claimed by the city to amount to contracts) contained in the orders of location: whether

(*a*) Under a delegated authority from the legislature and as its agents for the time being, or

(*b*) As the agents and representatives of the City of Worcester in its corporate capacity?

Second. Was the Board of Aldermen, at the time of granting the orders of location, authorized to impose, in form and manner as it attempted to do, the so-called "conditions" requiring the street railway to maintain and keep in repair any part of the surface material of the streets in which the Company was authorized to extend the location of its tracks?

[NOTE. This question was not answered by the Supreme Judicial Court of Massachusetts, as its determination on the effect and constitutionality of the Statute of 1898, chapter 578, rendered the decision of this question immaterial.]

Third. If said Board of Aldermen acted in imposing the so-called conditions as the representatives of said city, and if said board was authorized to impose the conditions in form and manner as it attempted to do, did it represent said city

(*a*) In its corporate capacity as a mere governmental agency, or

(*b*) In its private corporate capacity and as officers of said city dealing with rights or property belonging to said city in its proprietary capacity?

Fourth. Were the purpose and effect of Chapter 578 of the

Acts of 1898 to terminate the obligation of street railway companies to perform active duties in the maintenance and repair of the surface material of streets?

Fifth. If the purpose and effect of the Statute of 1898 (chap. 578) were to abrogate the obligations set out in the five suits begun by the City of Worcester, was it within the power of the legislature of Massachusetts to enact said statute, or did the statute violate the provisions of the Constitution of the United States prohibiting acts of the legislature

(*a*) Impairing the obligation of contracts or

(*b*) Depriving any person of his property without due process of law?

Sixth. Did the statute violate any provision of the constitution of Massachusetts?

ARGUMENT OF DEFENDANT IN ERROR.

First.

The Board of Aldermen of the City of Worcester in imposing the so-called conditions (claimed by the city to amount to contracts) contained in the orders of location acted, so far as it was intrusted with any power in relation to the location and construction of the defendant's railway, not in the capacity of officers or representatives of the City of Worcester, but as public officers under authority delegated to them by the legislature.

The City of Worcester, as a municipal corporation, had no power, whether acting by its Board of Aldermen, by its city government, or otherwise, with respect to street railway locations within its limits.

I.

Municipal corporations in the Commonwealth of Massachusetts possess only such powers and rights as are expressly granted

them by the State or such as are derived by necessary implication from the powers and rights expressly so granted.

In a comparatively early case, decided in 1840, it was held that a town could not be charged with the expense of building an embankment to divert one stream into another, for the purpose of avoiding the construction of more than one bridge in building a highway, which the town was lawfully required to build. The Court, speaking through Shaw, C. J., held that there was no implied power to build the embankment in connection with the construction of the highway, and in the course of its decision illustrated its conclusion as follows:—

> "A town might be so situated near the outlet of a lake or pond, where a road would be liable to be flooded and damaged by freshets, and where a very heavy expense would be required for the necessary bridges and embankments, but by cutting a canal and making a new outlet at the opposite side of the lake, at some distance, this expense might be saved. This would hardly be sufficient to raise a constructive power in the town, to undertake such distant canal, or to confer an authority on county commissioners to require it. It would lead to a latitude of construction, in regard to corporate powers and duties, which would be in a high degree dangerous. Such a case can seldom occur; and, when it does, and is of sufficient importance, it is better to leave it to be provided for by a special act of the legislature, which is the source and fountain of all public authority. Such an authority may be adapted to the particular case, and limited and modified, as the circumstances of each case may require."
>
> *Anthony* v. *Inhabitants of Adams*, 1 Met. 284, at p. 287. (1840.)

By a statute of the Commonwealth, cities and towns were authorized to erect and maintain lamps for lighting their streets. In response to an inquiry from the legislature the Supreme Judicial Court gave an opinion that cities and towns could constitutionally be authorized by the legislature to maintain

and operate gas or electric plants for furnishing light for themselves and for sale to their inhabitants. Notwithstanding this decision, the Court held that no authority to maintain and operate such a plant could be implied from the existing statute, authorizing a city or town to erect and maintain lamps for lighting the streets.

Spaulding v. *Peabody*, 153 Mass. 129. (1891.)
See *Opinion of Justices*, 150 Mass. 592.

In a case where a town had agreed with the plaintiff's predecessors in title to keep open a watercourse in consideration of certain grants from the plaintiff's predecessors in title, the Court dismissed the plaintiff's bill for specific performance on the ground that a power given to a town by legislative act, to keep certain streams open and free from obstructions, and to remove obstructions therefrom, conferred no power upon the town to remove dams from the stream, and that the agreement, although fully executed on the part of the plaintiff, was void and unenforceable.

Swift v. *Falmouth*, 167 Mass. 115. (1896.)

In the very early case of *Bangs* v. *Snow et al.*, reported in Volume 1 of the Massachusetts Reports, where the defendants sought to justify in an action of trespass *de bonis*, on the ground that they had duly acted as assessors of the parish in assessing upon its inhabitants, of whom the plaintiff was one, and in distraining upon the plaintiff's goods for his proportional share of the sum of $1,200, for past charges of the parish, of which it appeared that a large part was, in fact, used for securing the incorporation of the parish as a town, the defendants' counsel sought to support the legality of the tax by a statute authorizing the assessors of parishes to assess *all such rates and taxes as shall be agreed upon and granted by their parish at a meeting*, and by another statute authorizing parishes to grant money for certain purposes, *and all other necessary*

parish or precinct charges. This contention was disposed of, according to the reporter, as follows:—

> "But the Court were so clear that parishes had no powers, except those given by the statutes, and that those extended only to the settlement of ministers, building houses of public worship, and the charges arising from, and necessarily connected with, those objects, and that this doctrine had been so uniformly holden in the judicial courts, they would not permit the counsel to proceed in his argument, saying it was like arguing against a first principle, and respecting which there had never been any doubt."
>
> *Bangs* v. *Snow et al.*, 1 Mass. 180 at p. 189. (1804.)

Without an express legislative authority the Court has held that a town cannot appropriate money for defence against an invading enemy,—

Stetson v. *Kempton*, 13 Mass. 272, 279 (1816),—

nor to build a county highway,—

Parsons v. *Goshen*, 11 Pick. 396 (1831),—

nor to celebrate Cornwallis's surrender,—

Tash v. *Adams*, 10 Cush. 252 (1852),—

nor to purchase company uniforms,—

Claflin v. *Hopkinton*, 4 Gray, 502 (1855),—

nor to celebrate the Fourth of July,—

Hood v. *Lynn*, 1 Allen, 103 (1861),
Gerry v. *Stoneham*, 1 Allen, 319 (1861),
Morrison v. *Lawrence*, 98 Mass. 219, 221 (1867),—

nor to pay expenses incurred in promoting or opposing the annexation of one municipality to another,—

Minot v. *West Roxbury*, 112 Mass. 1. (1873.)
Coolidge v. *Brookline*, 114 Mass. 592. (1874.)

Further citations are unnecessary. They are full and conclusive to the point that municipal corporations in the Commonwealth of Massachusetts possess only such powers as are expressly delegated to them by the legislature or as they can be affirmatively shown to possess.

This Court has repeatedly stated that the powers of municipal corporations are such only as they can be clearly shown to possess.

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities."

Minturn v. *Larue et al.*, 23 Howard, 435, at p. 436. (1859.)

"It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them."

Detroit v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 at p. 388. (1901.)

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative

must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Pearsall v. *Great Northern Ry.*, 161 U. S. 646 at p. 664. (1895.)
Quoting *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666.

"The power, therefore, must be granted in express words, or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in the *Grand Rapid*, etc., *Power Company* v. *Grand Rapid*, etc., *Company* [33 Federal Reporter, 659], says 'that municipal corporations possess and can exercise only such powers as are granted in express words or those necessarily or fairly implied in or incident to the powers expressly conferred or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.' . . . This would make 'necessarily implied' mean inevitably implied." Lord Hardwick's explanation is "'that a necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark."

Detroit Citizens' St. Ry. Co. v. *The Detroit Railway*, 171 U. S. 48 at p. 54. (1897.)

"It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare."

Detroit v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 at p. 382. (1901.)

II.

No express or implied authority has ever been given the City of Worcester by its charter or any revision thereof, or by any special act of the legislature, to grant locations to street railway companies, nor to enter into any contract with such companies respecting locations.

This statement can be verified by an examination of the special legislation referred to, but such examination is unnecessary in the absence of a contrary claim on the part of the plaintiff in error.

III.

No authority to grant locations to street railway companies or to enter into any contracts with them respecting locations has ever been conferred upon the City of Worcester by the general statutes of the Commonwealth, nor has such authority ever been recognized by the decisions of the courts of the Commonwealth; but the whole policy of the State deducible from said statutes and decisions shows that the authority has been given to boards of aldermen and selectmen as public officers representing the whole public, and is to be exercised by them independently of any official relation to the municipality.

Evidences of the general separation of municipal acts from acts of municipal officers under authority delegated by the legislature.

This dual capacity of municipal officers is an essential feature of the governmental administration policy in Massachusetts, and was recognized and established long before the introduction of street railways in Massachusetts.

In *Dill* v. *Wareham*, 7 Metcalf, 438 (1844), Shaw, C. J., speaking for the Court, at page 447 said of a statutory authority to selectmen to grant permits for taking oysters:—

"But the court are of opinion that the selectmen, in giving permits under the authority thus conferred on them, are not

the agents of the town, subject to be directed, restrained, or controlled by its votes. They act under an authority conferred on them by statute, to be executed according to their own judgment, and do not act ministerially, according to the will of the town, expressed by its votes. It is like the authority given to selectmen, by other statutes, to lay out town ways, under which it has been held that a vote of the town, directing them to lay out a particular town way described, is irregular and void.

Kean v. *Stetson*, 5 Pick. 492. (1827.)"

Other examples of the recognition of this distinction, independently of cases directly affecting street railways, are the following:—

In a case where the question was as to the capacity in which members of a fire department, appointed and paid by the City of New Bedford, acted in the discharge of their duties, it was held as follows:—

"The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service; and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty."

Hafford v. *City of New Bedford*, 16 Gray, 297 at p. 302. (1858.)

In a case where the question was as to the capacity in which a surveyor of highways, elected and paid by the town, acted in repairing a highway, Bigelow, C. J., said:—

"They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties. They cannot remove them from

office during the term for which they are chosen. They are not amenable to towns for the manner in which they discharge the trust reposed in them by law. Nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents."

Walcott v. *Inhabitants of Swampscott*, 1 Allen, 101, at p. 102. (1861.)

And this decision was rendered notwithstanding that at that time, as now, cities and towns were by statute obliged to maintain and keep in repair the streets within their respective territories.

In a case where the plaintiff sought to charge the city for the acts of a police officer appointed and paid by the city, Bigelow, C. J., said:—

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts."

Buttrick v. *Lowell*, 1 Allen, 172 at p. 173. (1861.)

In a leading case, where the point at issue was as to the capacity in which the Board of Aldermen of the City of Boston acted in exercising their exclusive control of the construction of the common sewers in that city, the Court held:—

"The duties of the aldermen in determining what drains should be built, and where they should discharge, were of a quasi-judicial nature, involving the exercise of a large discretion, and depending upon considerations affecting the public health and general convenience. They were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers."

Child v. *City of Boston*, 4 Allen, 41, at p. 51. (1862.)

And where the question raised was as to whether the City of Boston was estopped from claiming title to land by the wrongful act of its assessors in taxing it to a person who had no title to the same, or by a sale by a collector of the City of Boston for non-payment of such tax, the Court held that such acts of such officers could not work an estoppel against the city, giving the following as the reason for their decision:—

> "If the assessors and collector were to be regarded in the light of mere private agents of the city, there might be some foundation for the demandants' position, that the city is estopped to deny the validity of their acts. But they are not to be so regarded. Though elected by the city, they are public officers, having their duties prescribed by law, for the general welfare, and are guided by the law in the exercise of these duties."
>
> *Rossire* v. *City of Boston*, 4 Allen, 57 at p. 58. (1862.)

In an even stronger case on the facts, the Supreme Court of Massachusetts has held that the city government itself of the City of Boston acts in certain respects not as agents of the city, but as public officers. In the case mentioned, the question was as to the capacity in which the city government acted in raising the grade of streets, and on that question the Court said:—

> "If, in proceedings of this character, the city government were to be regarded as the agents of the city, there could be little doubt that he would have such right. But, in laying out or raising the grade of streets, they act, not as agents of the city, but as public officers."
>
> *Griggs* v. *Foote*, 4 Allen, 195 at p. 197. (1862.)

In a case a few years later where the Court had to consider the question as to whether a town was bound by the admissions of its overseers of the poor to the extent of being precluded from showing that a certain pauper and his descendants had established a settlement in the town, it was held that such ad-

missions were not binding upon the town for the reason that overseers of the poor were not, in the conduct of their duties as such, agents of the town, although appointed and paid by the town.

City of New Bedford v. *Inhabitants of Taunton*, 9 Allen, 207, see particularly 209. (1864.)

So of a superintendent of streets appointed and paid, and whose duties were prescribed by a city under a power contained in its charter, the Court said:—

"The principle established by the authorities is, that the duty of keeping public ways in repair is one imposed upon all towns and cities alike, as a public duty from the performance of which they derive no special advantage in their corporate capacity: and that the agents selected to execute this duty in obedience to the law of the Commonwealth are to be regarded as public officers rather than as the servants or agents of the municipal corporation by which they are employed."

Barney v. *City of Lowell*, 98 Mass. 570 at p. 571. (1868.)

The constable and deputy collector of the City of Boston, in serving a warrant for the collection of taxes, has been held by the Court to be not a servant of the city, but a public officer, although appointed and paid by the city, so that the city is not liable to a person whom he illegally arrests, in an action of tort, nor is the city liable in an action of contract for the tax paid to the collector by the person illegally arrested. On this point the Court said:—

"The constable and deputy collector, in serving the warrant, did not act as the servant or agent of the city, but as a public officer of the law. If he exceeded his authority, the remedy of the plaintiff is in a suit against him; but the city is not responsible, and the plaintiff cannot maintain an action against it for damages, nor to recover back the money paid."

Dunbar v. *City of Boston*, 112 Mass. 75 at p. 75. (1873.)

So, if the assessors and collectors of a town commit assault and battery, and are guilty of false imprisonment while performing their duties in that capacity, and even though they act in so doing with such integrity and fidelity as not to make themselves liable to an action, they do not make liable the town which elects and pays them.

"The assessors and collectors, though elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law."

Alger v. *Inhabitants of Easton*, 119 Mass. 77 at p. 78. (1875.)

So the selectmen of towns, acting under the authority of a statute instructing them to establish public watering-troughs in the town, act in so doing as public officers in such wise that, if in pursuance of a vote of the town they put up a trough of such a character as to frighten horses, the town is not liable for the injury so occasioned.

"These provisions make the selectmen a board of public officers charged with this duty; they are not agents of the town, but they represent the general public. . . . The towns, in their corporate capacity, have not been given the right by statute to construct drinking-troughs in the public highways, nor does it appear that they have usually exercised the right. The vote of the town instructing the selectmen in this duty, and limiting the expense, was irregular and unauthorized."

Cushing v. *Inhabitants of Bedford*, 125 Mass. 526 at p. 528. (1878.)

In a leading case decided in 1887 the Court, after referring to cases in which a municipality is liable in actions of tort for negligence because of a statutory municipal duty or liability, said:—

"Easily distinguishable from these are the cases where the city or town is exonerated from liability, on the ground that the wrongful act complained of is not its act, but the

act of persons who are deemed to be public officers, existing under independent provisions of law; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes, are yet held not to sustain this relation in respect to the particular act in question; as, for example, members of a fire department."

Tindley v. *Salem*, 137 Mass. 171 at p. 173. (1883.)

This is the leading case upon the subject, in which the Court cited and reviewed the previous decisions, and which itself has been repeatedly cited since in a long series of decisions, rendering further citations superfluous to establish the proposition that in Massachusetts the dual capacity in which many municipal officers act is ingrained and fundamental in its system of administering the government of the State.

The fact that municipal authorities in the exercise of certain of their powers act as public officers and agents of the State has been the ground of numerous decisions of this Court.

Most notable of these cases recognizing this capacity of local authorities are those where city ordinances impairing the obligation of contracts have been held to be within the constitutional provisions prohibiting any *State* from passing any law impairing the obligation of contracts, the ground of the decisions being that the local authorities, in passing the ordinances in question, were merely exercising legislative power.

These cases were thus reviewed by this Court in *New Orleans Water-works*, v. *Louisiana Sugar Co.*, 125 U. S. 18 at p. 31:—

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative

branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the State. *Murray* v. *Charleston*, 96 U. S. 432, 440. See also *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S. 116."

Statutes authorizing Locations of Street Railways, and Judicial Decisions as to the Capacity in which the Officers delegated to make such Locations act.

At the dates of the several grants of location involved in the cases before this Court there were only two statutory provisions authorizing municipal officers in any capacity to act in the matter of locating street railways. One of these provisions was section 7 of chapter 113 of the Public Statutes, as follows:—

"The board of aldermen of a city or the selectmen of a town, upon the petition of such directors or a majority thereof, for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location, and after a hearing they shall pass an order refusing such location, or granting the same, or any portion thereof, under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true lo-

cation of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof."

This section 7 related only to locating a street railway in the first instance.

The only other section applicable was section 21 of chapter 113 of the Public Statutes, authorizing extensions of street railway locations, and was as follows:—

"The board of aldermen or the selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company, whose charter has been duly accepted, and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise."

This was the only provision of the Public Statutes of Massachusetts in any way authorizing the location of an extension of a street railway, and is admitted by the pleadings in the cases before this Court to have been the statutory provision under which all the action of the Mayor and Aldermen of the City of Worcester, in granting the locations in question, was taken.

For this admission as to the two petitions for mandamus, No. 144 and No. 145, see reservation by Chief Justice Holmes, near bottom of p. 12 of the Transcript of Record in each case.

The first bill in equity, No. 146, related to the same location as the first petition for mandamus, No. 144, and the second

bill in equity, No. 147, related to the same location as the second petition for mandamus, No. 145.

For this admission as to the action of contract, No. 148, see, regarding the various locations declared on in the plaintiff's declaration, the specific statement that each location was made under the provisions of section 21 of chapter 113 of the Public Statutes; as to count 1, page 5 of the Transcript of Record; as to count 2, page 6 of the Transcript of Record; as to count 3, page 7 of the Transcript of Record; as to count 4, page 9 of the Transcript of Record; as to count 5, page 10 of the Transcript of Record; as to count 6, page 12 of the Transcript of Record; as to count 7, page 13 of the Transcript of Record.

Said section 21 of chapter 113 of the Public Statutes was first enacted as section 11 of chapter 29, Acts 1874, which was the first statute authorizing the organization of street railway companies without a petition to the legislature for a special charter.

Said section 7 of chapter 113 of the Public Statutes, in substantially the same form, was first enacted by section 14 of chapter 229 of the Acts of 1864, which was the first comprehensive attempt on the part of the legislature to enact general provisions of law to govern street railways, the practice up to that time having been to insert in each special charter such provisions as seemed to the legislature expedient.

The corresponding provisions in special charters, as illustrated in the charter of the Cambridge Railroad Company, the second company chartered in Massachusetts, Acts 1853, chapter 383, were as follows:—

By section 1 certain persons were incorporated

> "with power to construct, maintain, and use a railway or railways, with convenient single or double tracks, from such point or points of the city of Cambridge, upon and over the streets or highways therein, as shall be from time to time fixed and determined by vote of the mayor and aldermen of the said city of Cambridge, and assented to in writ-

ing by said corporation. . . . Provided, however, that all tracks of said railroad shall be laid at such distances from the sidewalks in said cities as the mayor and aldermen thereof, respectively, shall in their orders, fixing the routes of said railroad, determine to be for the public safety and convenience."

By section 8 it was further provided as follows:—

"The said road shall be constructed and maintained in such form and manner, and upon such grade, and with such gauge, as the mayor and aldermen of said cities and the said bridge corporation, respectively, may, in their votes, fixing and determining the routes thereof as aforesaid, prescribe and direct, and whenever, in the judgment of said railroad corporation, it shall be necessary to alter the grade of any street so occupied by it, such alteration may be made at the sole expense of said corporation, provided the same shall be assented to by the mayor and aldermen of said cities, respectively."

By Acts 1871, chapter 381, which was the first general revision of Acts 1864, chapter 229, the provisions of said section 14, Acts 1864, chapter 229, were re-enacted substantially without change.

Acts 1871, chap. 381, sect. 14.

The question of the relation of a street railway company to a municipality within which any part of its railway existed, and of the capacity in which the mayor and aldermen acted in locating such railway, was early considered by the Supreme Judicial Court of Massachusetts.

Indeed, the first case arose upon the construction of the charter of the Cambridge Railroad, above mentioned, Acts 1853, chapter 383. The City of Cambridge brought a bill in equity against the company to restrain it from increasing its fares above the amount which the mayor and aldermen had undertaken to limit when they authorized the company to extend the location of its railway in said city. Although it was found

by the Court that this increase of fare might subject the charter of the company to forfeiture if it were made in excess of the power of the company, and although the Court found that by the company's charter the City of Cambridge was empowered after ten years to purchase the franchise and property of the company, a right of which it might be deprived in case of forfeiture, the Court refused to entertain the bill upon the ground that neither the city of Cambridge in its corporate capacity, nor the mayor and aldermen of said city, as its representatives, had any standing before the Court to bring the bill. In the course of the opinion, delivered at the January term, 1865, Bigelow, C. J., discussing the capacity in which the mayor and aldermen acted in locating the defendant's railway, said:—

> "So far as they are intrusted with any power in relation to the location and construction of the road, and other matters connected with its use, these duties are specifically enumerated and defined, and they are to be performed by them, not as officers acting for or representing the city, but as a body of men on whom certain duties of a ministerial or quasi-judicial nature are by law devolved. These duties have no necessary or essential connection with those which they are called on to perform in their official capacity, as a branch of the city government. They might have been imposed as well on any other body of men, if the legislature had seen fit, although it was doubtless wise, as a matter of convenience and expediency, that they should be performed by those who, in their official connection with the city, would be more likely to discharge them without difficulty and to the advantage of the public."
>
> *Cambridge* v. *Cambridge R.R. Co. et al.*, 10 Allen, 50 at p. 57.

Immediately following the enactment of Acts 1864, chap. 229, the first general street railway statute, in Massachusetts, another case was decided by the Supreme Court of Massachusetts, in which the Court again had occasion to consider the capacity in which the mayor and aldermen of a city acted in matters relating

to street railways. This case was brought by the Union Railway Company to restrain the officers of the City of Cambridge from enforcing an order prohibiting the company from removing snow from its tracks, the effect of the order being to prevent the operation of the plaintiff's railway. The order was made by the aldermen of Cambridge, purporting to act under authority of said Acts 1864, chapter 229, section 16, which, so far as in point, was as follows:—

> "The board of aldermen of any city, or the selectmen of any town, in which a street railway is operated, may, from time to time, establish by an order such rules and regulations as to the rate of speed, mode of use of the tracks, and removal of snow and ice from the same, as in their judgment the interest and convenience of the public may require."

In the opinion of the Court, delivered in November, 1865, Mr. Justice Hoar, after observing that the "legislature have adhered with great uniformity to the policy which was adopted from the outset of making these corporations subject in a great degree to the direction and control of the board of aldermen of cities and selectmen of towns in which their franchise is to be exercised," continued:—

> "This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public. *Cambridge* v. *Cambridge Railroad*, 10 Allen, 57, 58."
>
> *Union Railway* v. *Cambridge*, 11 Allen, 287. (1865.)

In a case decided by the Supreme Court in 1872, where a street railway company had brought a bill to prevent the revocation of its location under the provisions of Statute 1864, chapter 229, section 15, which authorized the board of aldermen of a city or selectmen of a town to revoke the location of any tracks within the limits of such city or town, Mr. Justice Colt, in delivering the opinion of the Court dismissing the bill, said:—

"The franchise which the plaintiffs took under their charter is by the laws of the Commonwealth thus limited and qualified. Their right to the use of the streets is not for all purposes exclusive, and must be exercised in common with the rights of other travellers and a just regard to public convenience; and this end is attempted to be secured by giving to the officers of cities and towns, as the most fit tribunal for that purpose, the powers above enumerated, to be exercised as in their judgment the weight of the public convenience in the use of the streets may require. The legislature have adhered from the first to the policy of making these corporations, in the use of the streets, subject to the control of the municipal officers of the cities and towns in which the franchise is to be used. And this control is given to these officers, as is said in *Union Railway Co.* v. *Cambridge*, 11 Allen, 287, 292, 'not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public.'"

Medford & Charlestown R.R. Co. v. *Somerville*, 111 Mass. 232 at p. 235.

More recently a petition was brought against the City of Worcester, plaintiff in the present suits, for an assessment of damages caused to the petitioner's land by certain acts of the Worcester Consolidated Street Railway Company, the defendant in the suits now before this Court, performed under and in accordance with an order of location of its tracks in a certain street. The Supreme Court, in holding that the petition could not be maintained, observed:—

"In granting the location, the Board of Aldermen acted not as the agents of the city, but as public officers."

Underwood v. *Worcester*, 177 Mass. 173. (1900.)

In a case somewhat similar to that of *Underwood* v. *Worcester*, where the plaintiff sought to recover damages caused by water overflowing from a gutter which, it was alleged, the defendant town allowed to be obstructed in the construction of

a street railway, the Supreme Court, in ordering judgment for the defendant, stated:—

"Much of the argument of the plaintiff seems to proceed upon the theory that the town is bound by the acts of the selectmen, and that the act of the selectmen amounted to a granting of a franchise by the town. But it is well settled that the selectmen in granting a location do not act for the town, but as public officers exercising a quasi-judicial authority. *Vinal* v. *Dorchester*, 7 Gray, 421, 422. *Young* v. *Yarmouth*, 9 Gray, 386, 389. *Cambridge* v. *Cambridge Railroad*, 10 Allen, 50. *Union Railway* v. *Mayor and Aldermen of Cambridge*, 11 Allen, 287, 292. *Washburn* v. *Easton*, 172 Mass. 525. *Underwood* v. *Worcester*, 177 Mass. 173."

Hewett v. *Canton*, 182 Mass. 220 at p. 223. (1902.)

The next case cited, dealing with railroad corporations and the powers of selectmen with regard to certain details of railroad construction, and with the capacity in which such powers are exercised, so clearly states the general proposition, and has been so often cited by the Court in cases directly affecting street railways, that it is inserted at this point:—

"The legislature have authorized and constituted corporations, with capitals, to construct them (railroads) and regulate the use of them, and have imposed such duties and obligations as, in their opinion, the public safety requires. Towns, in their corporate capacity, can neither enlarge nor diminish the powers and privileges or the duties and responsibilities of railroad corporations. It is true that, in certain cases, town officers are invested with special powers, to direct and assent to the modes of crossing public highways by railroads; but, in exercising these powers, town officers, thus designated, do not act under the authority of towns, nor as their agents. Nor could such town officers be restrained or governed by the vote of the town, in the exercise of these statute powers."

Vinal v. *Dorchester*, 7 Gray, 421 at p. 422. (1856.)

The Attorney-general of the Commonwealth in his official capacity as legal adviser to various State officials and departments, in an opinion given to the Massachusetts Highway Commission construing their powers affecting street railways constructed upon State highways, stated the law under the provisions of the Public Statutes involved in the consideration of the present suits before this Court, as follows:—

> "The delegation of this authority to boards of aldermen in cities and to selectmen in towns did not confer any rights in respect to such grants upon cities and towns themselves. The officers so delegated act not as agents of the cities and towns, but as representatives of the Commonwealth, guarding the interests of the public. They had no right to bargain and sell street railway franchises, nor to make terms with street railway companies which should accrue to the financial benefit of the cities and towns in which the locations were given. They could not make a binding contract, either for a time limit of the franchise or for the payment of any revenue directly or indirectly to the Commonwealth or to a city or town."
>
> *Attorney's-general's Report*, 1900, p. 61.

That the legislature of Massachusetts knew how to employ apt language to authorize a municipality to contract with a street railway company, when such was the will of the legislature, is sufficiently and conclusively demonstrated in two instances of special statutes, each the subject of a decision of the Massachusetts Supreme Court. These special statutes, so far as they relate to the point in issue, are as follows: —

> "That said city [of New Bedford] or town [of Fairhaven] is hereby authorized and empowered to contract with said railway corporation concerning the construction, maintenance, and operation of said railway, upon such terms as it may agree with said railway corporation, any laws now existing to the contrary notwithstanding."
>
> Statute 1872, c. 11.
> *New Bedford & Fairhaven St. Ry. Co.* v. *Acushnet St. Ry. Co.*, 143 Mass. 200 at p. 201.

The other instance related to the conditions under which the use of certain subways in the City of Boston might be authorized by the Boston Transit Commission : —

> "Said commission shall, subject to the approval of the board of railroad commissioners, fix by contract the terms and conditions and rates of compensation for the locations for said two tracks in any of said subways and tunnels, and for the use thereof by any street railway company or companies during a term of years not exceeding fifty."
>
> Statute 1894, chap. 548, sect. 35.
> *Browne* v. *Turner*, 176 Mass. 9.

From this review of the general policy of the Commonwealth as interpreted and defined by its court of last resort for the past century, it is apparent that —

(1) The powers of municipal corporations in Massachusetts are strictly construed and must be clearly proved to exist.

(2) The Massachusetts courts have uniformly distinguished between acts of a purely corporate or municipal character and acts of municipal officers who, though appointed and paid by the city, and in some respects its agents, perform a great variety of duties under a delegated authority in the performance of which they are independent of and not responsible to the municipal corporation.

(3) This principle that local authorities act in many respects as public officers was recognized and had become a fundamental part of Massachusetts policy long before the date of the first charter of the City of Worcester, and long before the introduction of street railways in Massachusetts, and was distinctly and specifically applied by the courts of the Commonwealth, and was the ground of their decision in determining the capacity in which local authorities acted in relation to street railways the first time the question was ever called to their attention.

(4) The fact that the courts had held that the local au-

thorities acted in relation to so many subjects of public interest, like highways, watering-troughs, fisheries, parks, paupers, police, fire departments, water-works, sewers, etc., in no other capacity than as public officers, and the close analogy between these public objects and that of street railways, which would be a nuisance in the highways, were it not for the duties they perform to the public, as was well pointed out by Shaw, C. J., in *Commonwealth* v. *Temple* (14 Gray, 69) in 1859, renders it clear that the strongest evidence must be adduced to prove that public officers act in relation to street railway companies in any capacity different from that in which they act in reference to such other public objects,— namely, as public officers; and no such evidence has been, or can be, presented in the cases before this Court.

(5) The Court in 1865 in *Cambridge* v. *Cambridge Railroad Co.*, 10 Allen, 50, decided that local authorities acted as public officers in relation to street railway companies, and not as representatives of the municipality. The statutes in force at that time and interpreted in that decision have never since been substantially changed in their provisions delegating power to local authorities respecting the location of street railways. On the contrary, in every instance of re-enactment of the street railway law, the same language as there interpreted has been repeated. Numerous decisions since that referred to have affirmed the doctrine of that case. The legislature must therefore be conclusively held in its enactments since said decision to have used such language with the meaning which the Court in that case put upon it, inasmuch as said enactments were passed with knowledge as to the interpretation which the final judge as to their meaning, the Supreme Judicial Court of the Commonwealth, would put upon them. The general principle that express and explicit language must be used by the legislature to abrogate the effect of judicial decision is applicable in its full force in this connection. Similarly, the continued use of this language after said first

decision shows that the legislature accepted that decision as the correct interpretation of the legislative intention in its original use.

The conclusion, therefore, which must necessarily follow on this branch of the argument in these cases is as follows: —

The locations in question having been granted by persons who, though municipal officers, acted in granting the locations as public officers in no way representing the City of Worcester, said city cannot have become a party to a contract between it and the Street Railway Company, the defendant in error; nor can it have imposed on the Street Railway Company any obligation in the nature of a property right of the city.

SECOND.

The requirement relative to paving as contained and set forth in the grants of the extensions of locations for the Company's railway was never valid under the law existing at the time said grants were made, nor enforceable against the Company.

I.

It is the duty of cities and towns to maintain highways in repair when other provision is not made therefor.

The general provision of law in force when these locations were granted and when these suits were brought, with reference to the maintenance and repair of highways, townways, streets, causeways, and bridges, is contained in Public Statutes, chapter 52, section 1, which is as follows: —

"SECTION 1. Highways, townways, streets, causeways, and bridges shall be kept in repair at the expense of the town, city, or place in which they are situated, *when other provision is not made therefor*, so that the same may be

reasonably safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the year."

Such has been the law of the Commonwealth for many years, this section being but a re-enactment of previous statutes in substantially the same language running back to a time long prior to the first charter granted for the incorporation of a street railway company.

R. S., 1836, chap. 25, sect. 1;
G. S., 1860, chap. 44, sect. 1;
Acts of 1877, chap. 234, sect. 1; and
P. S., 1882, chap. 52, sect. 1 (already cited).

The first street railway charter granted in Massachusetts was chapter 353, Acts of 1853, entitled "An Act to incorporate the Metropolitan Railroad Company."

Unless, therefore, some other provision of law exists relative to the repair of the streets, in the City of Worcester referred to in these actions, it is the duty of that city to maintain said streets, and the words in section 1 of chapter 52 of the Public Statutes, "When other provision is not made therefor," refer to other provision made by the legislature itself; and the burden imposed by that statute upon the City of Worcester cannot be shifted to other shoulders, except by the legislature itself or under its authority.

II.

There was no other provision of law requiring this defendant to maintain the entire width of a street, or to pave any portion of a street.

The general street railway law, Public Statutes, chapter 113, in force at the time the grants involved in these cases were made, did not impose upon street railway companies the duty of *paving* the streets, either between the rails or outside of

the tracks, but merely required a company to *keep in repair* the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, the exact language of the statute being as follows: —

> "SECT. 32. Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, and, if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks."
>
> P. S., chap. 113, sect. 32.

The section quoted above was the only statutory provision imposing upon street railway companies any obligation relative to the repair of streets, and the specific designation of the portions of the streets which were to be maintained clearly implies that a company, whose rights and liabilities are fixed by the legislature, owes no duty in respect to the repair of streets beyond that imposed by the legislature.

Commonwealth v. *Smith*, 10 Allen, 448, pp. 456–458.

The requirement imposed in the cases at bar is clearly far beyond the limits of this statute, and, therefore, not binding upon a company under this section; nor at all, unless some other statute warranting the imposition by the aldermen of the requirement in question can be pointed out.

III.

No authority to impose such requirements at the time these grants were made existed in the Board of Aldermen.

If such authority did exist, it must have been created by statute. There were but two provisions of statute law in force, at the dates when the several grants of location involved in these cases were made, delegating to boards of aldermen authority to grant locations to street railways.

1. Such boards were authorized to grant or refuse locations to a proposed street railway company "under such restrictions as they deem the interests of the public may require."

P. S., chap. 113, sect. 7.
See copy of this section, *ante*, p. 22.

2. Exactly the same form of language is employed in the statute relative to the granting of locations for extensions of the company's railway.

P. S., chap. 113, sect. 21.
See copy of this section, *ante*, p. 23.

The latter section is the one under which it is admitted that the locations now before the court were granted, as has been shown above by specific references to the pleadings as set forth in the transcripts of Record.

Both statutory provisions limit the nature of the obligations which the aldermen may impose by the word "restrictions."

The obligation in fact sought to be imposed in the locations in question was clearly far in excess of what the statute itself (P. S., chap. 113, sect. 32) imposed, and was, therefore, not binding upon the Company under that section; and was not binding at all unless the authority to impose restrictions under section 21 of chapter 113 warranted the imposition by the aldermen of the requirement in question.

The word "restrictions," it is submitted, was intended to signify such limitations upon what otherwise would have been an unrestricted grant as the aldermen or selectmen might deem to be for the interests of the public. It was not intended to authorize the imposition of obligations for the pecuniary benefit of cities and towns in which a street railway might be located, but only such restrictions or limitations upon the construction and use of the railway itself as in the judgment of selectmen or aldermen would best promote the interest of the whole public; that is, the public of the whole Commonwealth, every member of which is entitled to the same free and beneficial use of the highway as the citizens of the particular cities and towns in which the highway may lie, and at whose expense it must be maintained.

Contemporaneous Construction of the Word "Restrictions" by Public Officers and Boards charged with enforcing the Laws.

Certainly, the view above stated of the significance and scope of the word "restrictions" is that held by those officers of the Commonwealth whose official duties bring them most in contact with matters affecting street railways, and whose opinions, therefore, are entitled to weight as indicating the probable general opinion, in the absence of anything showing the contrary. This exact question has been discussed in a recent opinion of the Attorney-general of the Commonwealth, in the course of which he says: —

> "A comparison of the old with the new railroad law may serve to illustrate this distinction. Under the old law (P. S., chap. 113, sect. 7) the municipal boards were authorized to grant or refuse locations 'under such restrictions as they deem the interests of the public may require.' Similar language governs their action in respect to extensions of the original location. The present law (S. 1898, chap. 578, sect. 13), on the other hand, expressly authorizes the municipal boards to 'impose such other terms, condi-

tions, and obligations in addition to those applying to all street railways under the general provisions of law as the public interest may in their judgment require.' The distinction between the two is material. The word 'restrictions,' as used in the former law, was obviously intended to signify such limitations upon what otherwise would be an unrestricted grant as they might deem to be for the interest of the public. For example, provisions as to the kind of rails to be used, the time of completion of the work, the rates of fare to be charged, the number of cars to be run, and the portions of the streets in which tracks should be laid would be 'restrictions' for the benefit of the public, and which municipal boards under the old law would be authorized to impose."

Attorney-general's Report, 1900, p. 61. Opinion given to the Massachusetts Highway Commission, May 25, 1900.

The Board of Railroad Commissioners had occasion to consider the same question in 1887, on the petition of the West End Street Railway Company for an increase of stock in which the Company sought to capitalize contributions, promised at the time certain locations were granted, towards the expense of widening and constructing the Beacon Street boulevard and the bridge over the Boston & Albany tracks in said Beacon Street. In the course of the opinion of the Board upon this petition the Board expressed the following views: —

"By section 7 of said chapter [P. S., chap. 113] it is provided that the board of aldermen, or the selectmen of a town, may grant 'locations under such restrictions as they deem the interests of the public may require.'

"The power to impose restrictions necessarily implies power on the part of the railway company to incur such expenditures as may be necessary or proper in order to comply with the restrictions, and the question arises whether the restrictions which were imposed in the case of this railway cover any portion of the expenditures under consideration. Neither in the grant of the location in the city of Boston, nor in that in the town of Brookline, was there

any restriction or provision requiring the railway company to contribute, or cause to be contributed, any land for the widening of the street, or any sum of money to pay for the construction of the roadway, nor in either case was the grant of location declared to be dependent upon the widening of the street. Moreover, *if such requirement or proviso had been expressed, it could not properly have been considered a restriction within the meaning of the statute.*

"It may be claimed that these agreements entered into by Mr. Whitney were the considerations for the respective grants of location. . . . But, if these agreements are regarded as the considerations for the grants of location, the Board is equally at a loss to find in the statutes any authority for such expenditures. In some States railway locations are sold in accordance with special provisions of law therefor. In this state, not only is there no direct statutory provision authorizing a sale of a location, but the authority given to boards of aldermen and to selectmen to grant locations subject to certain 'restrictions' indicates no intent on the part of the legislature to authorize sales. If the legislature had intended to give such authority, it would not have used simply the word 'restrictions.' Moreover, the Board believes that no sale of a location has ever been made in this State. Certainly no sale has been made with the knowledge and approval of the Board."

Nineteenth Annual Report of Board of Railroad Commissioners, January, 1888, p. 166, at pp. 173–174.

In a still earlier case referred to at page 19 of the Report last cited, the Railroad Commissioners held that an attempted condition in a grant of location of the Middlesex Railroad Company, that the company should not charge more than three cents for fares in certain districts, was not binding as a "restriction." Referring to the condition, the Board said: —

"The general opinion of the legal profession is that a municipal board has no right to annex such a condition to the grant of a location; and in this opinion this Board concurs."

Thirteenth Annual Report of Board of Railroad Commissioners, January, 1882, p. 122 at p. 124.

In another instance the Board of Railroad Commissioners, discussing the general street railway policy of the Commonwealth in a more recent annual report to the legislature, said: —

"It has been more or less seriously proposed to make the ordinary use of the surface of the street for railway purposes a source of revenue or relief to the municipal treasury, either by sale of the railway location or by an excise on cars, or a tax on earnings, or by requiring the railway company to pave or otherwise maintain the surface of the entire roadway. There is no reason why the railway company should not pay a tax on its corporate franchise and property such as other similar corporations pay. It is also proper that it construct at its own cost the tramway specially adapted to its use, and *keep the portions of the roadway adjacent thereto in safe condition for other travel, as is now required by statute.* These charges are a part of the cost of transportation which the passenger must expect to pay. Beyond this, it is not easy to see why one who carries passengers for hire in a car should be subjected to a tax for the use of the street, any more than one who carries passengers for hire in an omnibus, or who carries merchandise for hire on a dray. The radical objection to the proposed impost is not, however, that it is a burden on the railway company, but that it is a tax on the traveller. A tax on the carrier is a tax on the passenger. Whatever fare the railway passenger might otherwise have to pay, he must pay in addition to that fare his proportion of the tax; and the possibility of the reduction of his fare is to that extent postponed. Nothing has hitherto been more free than the use of the highway, for all persons, and for all purposes of travel or transportation. There is no good reason why the person who travels in a street car should pay, directly or indirectly, for the privilege of travelling on the highway, any more than the person who travels in a public coach or in his private carriage."

Twenty-seventh Annual Report of Railroad Commissioners, January, 1896, pp. 111, 112.

That the views of the Attorney-general and of the Board of Railroad Commissioners are entitled to consideration, see

Tyler v. *Pomeroy*, 8 Allen, 480 at p. 494, citing the opinion of Attorney-general Legaré, 3 Opinions Attorneys-general, 691.

Farnham v. *Haverhill*, etc., St. Ry. Co., 178 Mass. 300, citing the opinion of the Railroad Commissioners, p. 303.

As to value of contemporaneous construction,

Packard v. *Richardson*, 17 Mass. 122 at p. 144.

In a recent case before the Supreme Court of Massachusetts an illustration of what is a valid requirement under the power of the municipal authorities to impose restrictions is furnished, where the validity of a requirement that a street railway company shall water the street over a portion of the way, is upheld as a restriction upon the manner of running cars in such a way as not to raise a dust.

Newcomb v. *Norfolk Western St. Ry. Co.*, 179 Mass. 449.

Legislative Construction of the Word "Restrictions."

That the legislature never contemplated that the power to impose restrictions under section 21 of chapter 113 of the Public Statutes conferred upon the board of aldermen any power *to exact compensation* from a company receiving the location is conclusively shown by the different and very explicit language used by the legislature in the only instances in which it has authorized such an exaction.

In 1900 the legislature delegated to the Board of Metropolitan Park Commissioners the power to grant street railway locations in the metropolitan roads, boulevards, parks, and

reservations. In section 2 of the Act, describing the method of making such grants, the legislature followed closely the language of sections 7 and 21 of chapter 113 of the Public Statutes, with this marked difference, that in place of the clause "under such restrictions as they deem the interests of the public may require" the legislature substituted the phrase "upon such terms, conditions, and obligations, *and for such compensation*, as the public interest and a due regard for the rights of the Commonwealth may require."

Acts 1900, chap. 413, sect. 2.

See also language used in Acts 1894, chap. 548, sect. 35.

The policy of the legislature as shown by its repeated legislation on the subject of repairs of streets by street railway companies indicates that it never intended to delegate to aldermen and selectmen authority to impose the requirements in question in the cases at bar.

The nature and extent of the duty of street railway companies to repair or maintain any portion of the highways in which their railways may be constructed has always been defined and regulated by the legislature itself through legislative enactments.

In the early history of the development of this means of transportation each company was chartered by a special act of the legislature, the location of the railway being in some cases fixed by the charter, but more generally left to be fixed by the aldermen of cities and the selectmen of towns. In nearly, if not quite, every case, the charter contained a provision prescribing the liability of the company with regard to repair of streets. The earliest provision was contained in the charter of the Metropolitan Railroad Company, Acts of 1853, chapter 353, section 3, and is as follows: —

"SECT. 3. Said corporation shall maintain and keep in repair such portion of the streets respectively as shall be

occupied by their tracks, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, construction, or use of said tracks or roads, . . . and said corporation shall not encumber any portion of the streets not occupied by the said road or tracks."

Substantially similar in language and effect is the provision on this subject in most of the other special charters.

The increase in the number and importance of such companies led to the enactment of a general law for their regulation in 1864, when an act entitled "An act concerning street railway corporations," being chapter 229 of the Acts of 1864, was passed. Section 14 of this Act embodied for the first time the provision later contained in section 7 of chapter 113 of the Public Statutes, authorizing aldermen and selectmen to grant locations "under such restrictions as they deem the interests of the public may require." The provision relative to repair of streets in this act was as follows: —

"SECT. 18. Every street railway corporation, its lessee or assigns, shall maintain and keep in repair such portions of the streets, roads, and bridges, respectively, as are occupied by its tracks, and eighteen inches on each side thereof, to the satisfaction of the superintendent of streets, the street commissioner, or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks; and in case any recovery is had against any city or town, steam railroad, turnpike, or bridge corporation, respectively, by reason of any defect or want of repair caused or permitted by the street railway corporation of that part of any street, highway, or bridge, occupied by its tracks, and eighteen inches on each side thereof, said street railway corporation, its lessees or assigns, shall be liable to said city or town, steam railway, turnpike, or bridge corporation, respectively, for any sums recovered against either of them, together with all costs

and reasonable expenditures incurred by them, or either of them, in the defence of any suit or suits in which recovery is had by reason of such defect or want of repair, provided the corporation, its lessees or assigns, had reasonable notice of such suit or suits, and an opportunity to assume the defence thereof."

As prior to the enactment of this general law every street railway had been located under the provisions of a special charter, some of which required the acceptance of the special act by the city or town before it became operative, and contained other special provisions, as a right in the municipality to purchase the railway, a limitation of the life of the charter, etc., the legislature saw fit to add to the general law the following two sections, apparently for the purpose of protecting the cities and towns in the enjoyment of any special privileges which they had exacted from the companies, and may have been justified in so exacting by the provisions contained in the special charters: —

"SECT. 44. Street railway corporations now existing shall continue to exercise and enjoy their powers and privileges, according to their respective charters and to the laws in force; and shall continue subject to all the liabilities to which they are now subject, except so far as said powers, privileges, and liabilities are modified or controlled by the provisions of this statute.

"SECT. 45. All acts and parts of acts inconsistent herewith are hereby repealed. But nothing in this act contained shall operate to annul or impair in any wise any terms or conditions upon which any charter has been accepted, or location or other privilege granted by any city or town, and which have been assented to by such corporation."

Acts of 1864, chap. 229.

Two years later the legislature again took up the question of the repair of streets by the street railway companies, and in chapter 286 of the Acts of the year 1866 repealed section

18, above quoted, of chapter 229 of the Acts of the year 1864, and substituted the following provisions: —

"SECTION 1. Every street railway corporation, its lessees or assigns, shall maintain and keep in repair such portions of the streets, roads, and bridges as are occupied by its tracks, and three feet on each side thereof, not including any portion of any sidewalk, to the satisfaction of the superintendent of streets, the street commissioner or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks, and in case any recovery is had against any city or town, steam railroad, turnpike or bridge corporation, respectively, by reason of any defect or want of repair caused or permitted by the street railway corporation of that part of any street, highway, or bridge occupied by its tracks, and three feet on each side thereof, exclusive of sidewalks, said street railway corporation, its lessees or assigns, shall be liable to said city or town, steam railway, turnpike or bridge corporation, respectively, for any sums recovered against either of them, together with all costs and reasonable expenditures incurred by them, or either of them, in the defence of any suit or suits in which recovery is had by reason of such defect or want of repair; provided the corporation, its lessees or assigns, had reasonable notice of such suit or suits, and an opportunity to assume the defence thereof.

"SECT. 2. The liability created by this act shall be held to be in lieu of, and a substitute for, all liability now existing in regard to paving by any horse railroad company under any location or contract with any city or town; provided that this act shall not take effect in any city or town where any liability to pave is imposed by any location given, until it has been accepted by such city or town.".

Acts 1866, chap. 286.

The act further provided, however, in specifically repealing said section 18 of chapter 229 of the Acts of 1864, that "such

repeal shall not impair or affect any rights or obligations heretofore accrued or incurred."

This act clearly indicated the legislative intention that the rights and liabilities created by the Act of 1864, relative to paving, should continue. It also continued, in section 2, the reservation contained in sections 44 and 45 of chapter 229, Acts of 1864, for the benefit of any city or town not choosing to accept the provisions of the Acts of 1866, chapter 286.

Five years later, in 1871, the legislature again enacted a general street railway law, printed as chapter 381 of the Acts of the year 1871.

Section 14 of this Act contained substantially the same provision as section 14 of chapter 229 of the Acts of 1864, relative to the location by aldermen and selectmen of the railway "under such restrictions as they deem the interests of the public may require."

Section 21 of this Act contained the provision relative to the repair of streets, the exact language being as follows: —

> "SECT. 21. Every corporation, its lessees or assigns, shall keep in repair such portions of any paved streets, roads, and bridges, as are occupied by its tracks; and, when such tracks occupy streets or roads that are not paved, it shall, in addition to the portion occupied by its tracks, keep in repair eighteen inches on each side thereof, to the satisfaction of the superintendent of streets, the street commissioner, or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the construction, management, and use of its tracks."
>
> Acts 1871, chap. 381.

In this section just quoted appeared for the first time the limitation of the portion of the street to be kept in repair by the street railway company, as it has ever since been in force until the enactment of chapter 578 of the Acts of the year

1898; to wit, the space occupied by the tracks, and, if the tracks are in unpaved streets, eighteen inches on each side thereof. The legislature at this time evidently determined that it was no longer wise to attempt to continue in force any special provisions contained in charters or grants of locations theretofore made, for sections 58 and 60 specifically repealed the general law of 1864, and, by repealing acts inconsistent with the Act of 1871, repealed also chapter 286, Acts of 1866. The two sections referred to are as follows: —

"SECT. 58. All corporations shall continue to exercise and enjoy their powers and privileges, according to their respective charters and to the laws in force; and shall continue subject to all the *liabilities* to which they are now subject, *except so far as said* powers, privileges, and *liabilities are modified and controlled* by the provisions of this statute."

"SECT. 60. Chapter two hundred and twenty-nine of the acts of the year eighteen hundred and sixty-four, and all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed."

Acts of 1871, chap. 381.

In 1874 the incorporation of street railway companies without the necessity of an application to the legislature for a special act was first authorized.

Acts of 1874, chap. 29.

There being already a general law (viz., Acts 1871, chap. 381) in force for the regulation of such companies, when established, this act contained comparatively few sections in part designed to facilitate the incorporation of companies thereunder, and in part to cover certain matters not included in the General Act of 1871. Section 6, for example, provided for the location of the railway by aldermen or selectmen *before* the organization of the company could be completed, but adopted the phrase found in the general law,

relative to locating railways of companies organized under special charter; viz., "under such restrictions as they deem the interests of the public may require."

Section 11 of this Act contained substantially the provision later embodied in section 21 of chapter 113 of the Public Statutes, relative to extensions of locations of street railways, as follows: —

> "SECT. 11. The board of aldermen of any city and the selectmen of any town may, from time to time, upon petition, authorize and empower any street railway corporation, its lessees and assigns, whose charter has been duly accepted, and whose tracks have been located and constructed, to extend the location of its tracks within the territorial limits of such city or town, whenever it can be done without entering upon or using the tracks of any other street railway corporation, under such restrictions as they deem the interests of the public may require. And the location thus authorized shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof, in writing, is filed in the office of the clerk of such city or town within thirty days after receiving notice thereof. Before acting upon the petition, notice of the time and place of hearing shall be given to all parties interested, by publication, at least fourteen days prior thereto, in such newspapers or otherwise as the board of aldermen or selectmen may determine."
>
> Acts of 1874, chap. 29, sect. 11.

The act contained no provision regarding the repair of streets, as apparently the legislature felt that that was amply covered by the General Act of 1871, chapter 381, section 21.

In 1881 an important change in the law was made by chapter 121 of the Acts of 1881, which provided as follows: —

> "SECTION 1. Section twenty-one of chapter three hundred and eighty-one of the acts of the year one thousand eight hundred and seventy-one is hereby amended by inserting therein, after the word 'repair,' in the second line

thereof, the words 'the paving, upper planking or other surface material of,' so that said section as amended shall read as follows: Every corporation, its lessees or assigns, shall keep in repair the paving, upper planking or other surface material of such portions of any paved streets, roads and bridges as are occupied by its tracks; and when such tracks occupy streets or roads that are not paved it shall, in addition to the portion occupied by its tracks, keep in repair eighteen inches on each side thereof to the satisfaction of the superintendent of streets, the street commissioner or the surveyors of highways, and shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of its agents and servants in the construction, management and use of its tracks."

Acts of 1881, chap. 121.

For the exact effect of this act in still further limiting and restricting the liability of street railway companies, with reference to maintenance and repair of highways, see the case, recently decided in the Supreme Court of Massachusetts, of

Leary v. *Boston Elevated Railway Company*, 180 Mass. 203.

To summarize the general legislation on this subject, it appears that the legislature in the first General Act of 1864 prescribed that these companies should keep in repair a certain longitudinal portion of the street occupied by the tracks, and a space eighteen inches wide on each side thereof, irrespective of whether the street was or was not paved, but provided that the act should not annul or impair different requirements upon which any locations or other privileges had been granted in any city or town, and which had been assented to by a corporation.

Two years later the portion of the street to be kept in repair by companies was extended to include a strip three feet wide on each side of the tracks, and irrespective of whether the street was or was not a paved street. This act also con-

tained provisions for not invalidating different requirements prior to 1864.

In 1871 all exceptions were brushed aside, and the legislature prescribed that the portion of the street to be kept in repair should be the same as the portion described in almost identical language in the Public Statutes; while in 1881 came the final provision not changing the portion of the street to be kept in repair, but limiting the nature of the repair work to the surface material only of streets, roads, and bridges.

The codification made in 1882 of the general laws in the Public Statutes, chapter 113, taking the place, as it did, of all prior statutes, made no exceptions, and continued in force no exceptions or reservations contained in prior statutes, general or special, on this subject, even though such prior statute had not already been repealed before the enactment of the Public Statutes.

All these statutes are mandatory in form, and while in force were respectively binding upon all the street railway companies in the Commonwealth. An examination of these statutes clearly shows that the legislature has considered and acted upon nearly every possible phase of paving requirements to be imposed upon street railways, and has done so with the manifest intention of being itself the final and exclusive arbiter in the matter.

In view of the large number and frequency of the express enactments of the legislature itself, defining, regulating, and changing the duty of street railway companies with regard to maintaining any portions of streets in repair, and of the minute detail with which the legislature has treated the subject, can it be seriously contended that the legislature has ever parted with any of its jurisdiction, or ever intended to delegate to aldermen and selectmen any authority, over the subject of the duty of street railways with regard to the maintenance and repair of streets?

The above review of the acts of the legislature makes it

clear that the legislature has itself dealt specifically and exhaustively with the subject of the duties of street railway companies relative to the repair of streets.

The matter of requiring street railway companies to make repairs in the streets must, therefore, be held to have been removed from the jurisdiction of local boards on the principle, which must be clear, that the restrictions which might be imposed by local authorities in granting a location should not relate to a subject-matter regarding which special provision is made by the legislature itself.

This principle, that the conditions which may be imposed by local authorities in granting a location do not include those for which special provision is made by statute, has been clearly recognized in a recent case decided by the Supreme Judicial Court of Massachusetts since the present suits were originally entered. In that case the selectmen of certain towns in granting locations for a street railway prescribed conditions as to the fares which might be charged for the transportation of passengers within the limits of the respective towns, purporting to act, in imposing said conditions, under authority of the general street railway law then in force, Statute 1898, chapter 578, section 13 thereof, which provided that local authorities in granting a location to a street railway company might prescribe the manner in which the "tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations, in addition to those applying to all street railway companies under the general provisions of law, as the public interest may, in their judgment, require."

Although, as will be seen, the local authorities were authorized by this statute to impose terms, conditions, and obligations on street railway companies, and not merely "restrictions," the Court held that said conditions as to fares were invalid, for the reason that, inasmuch as the statute provided that the directors of a street railway company might "establish the

rates of fare of all passengers and property conveyed or transported in its cars, subject however to the limitations named in its charter or hereinafter set forth," and provided further for a revision and regulation of the fares by the Railroad Commissioners, the legislature itself had made special provisions relative to rates of fare, and therefore the subject-matter of rates of fare was removed from the jurisdiction of the local authorities.

Keefe v. *The Lexington & Boston Street Ry. Co.*, 185 Mass. 183.

Both from the nature of the capacity in which the board of aldermen acts in locating a street railway, considered in the earlier part of this brief, as well as from the express language of the statute itself under authority of which they so act, they are confined in imposing restrictions to the imposition of such restrictions as they deem the interests of the public may require, and the interests of the public so referred to means only the interests of the whole public in regard to the location, construction, operation, and use of the railway, and it does not mean the interests solely of the people of the City of Worcester in their individual capacity, and still less the interests of the city treasury of Worcester, or the interest of the tax-payers of that city by relieving them of their share of the burden imposed by section 1 of chapter 52 of the Public Statutes.

If under the guise of a restriction the aldermen could legally require a street railway company to pave, and thereafter maintain the pavement, over the whole width of the street, notwithstanding the fact that the legislature itself had prescribed the exact portion of the street, the surface material of which the company should maintain, and had thereby created and imposed an equal and proportionate burden upon all the street railway companies of the State, and if the aldermen could similarly exact from the street railway company a money

payment to defray the cost to the city of its laying a macadam pavement entirely outside of the portion of the street prescribed by the legislature, what possible objection could be urged against the imposition of any pecuniary obligation or tax upon such companies under the guise of restrictions?

The work performed, and the payment made, by the Worcester Company in the cases at bar were for the benefit of the City of Worcester only because that work and payment relieved that city from the necessity of itself performing and paying for the work; that is, they released so much of its available funds from the purpose to which otherwise they must have been devoted, and enabled the city with those funds to meet other objects which would otherwise have required either a larger tax levy or a delay in the execution of those other objects. The amount so originally derived from a street railway company could have been accurately established; and precisely the same result would, therefore, have followed if the restrictions had been in the form of an obligation to pay so many thousand dollars upon the acceptance of the grant of location, and in the form of a further obligation for the payment of an annual sum of money estimated to be equivalent to the cost of the maintenance of the streets. Or, again, the same result would have followed, had the restriction imposed an obligation to build and maintain in repair a city hall, a school-house, or any other public building which by law the city might be required to provide and maintain.

Such exactions, under whatever name they are imposed, are in fact a tax levied upon the whole travelling public for the benefit of a particular city or town. Inasmuch as a city could not directly tax the inhabitants of another town, it is a violent assumption to claim that they can do so under a power to impose "restrictions" in the interests of the public,

Whether the power to exact money payments from street railway companies, whose only source of income is derived from the public riding in the cars, is a wise or unwise policy,

is beside the question in the cases at bar. The contention of the defendant here is that such has not been the policy of Massachusetts, and that no reasonable interpretation of language can extort from the words "under such restrictions as they deem the interests of the public may require" any justification for the inauguration of such a policy by boards of aldermen acting under authority of those words. Both the Board of Aldermen and the Street Railway Company derived their powers from, and are subject to the control of, the legislature, and, as regards the requirement sought to be enforced in the present actions, both the aldermen and the company respectively derive their power and liabilities from chapter 113 of the Public Statutes.

Chapter 113 of the Public Statutes is one enactment, and all its sections are to be so interpreted as to give reasonable effect to each, if possible.

It is a familiar rule in the construction of statutes that the whole of the statute is to be considered.

Holbrook v. *Holbrook*, 1 Pick. 250.
Opinion of the Justices, 22 Pick. 571.
Commonwealth v. *McCaughey*, 9 Gray, 296.

If under section 21 of chapter 113 of the Public Statutes the aldermen were authorized to impose an obligation that a street railway company should pave and keep in repair the entire width of a street on which its railway is located, section 32 of the same chapter can be given no force or effect as imposing an obligation of the same kind upon the company, or at most can constitute only a minimum limitation upon the authority of the aldermen. Will it be seriously contended that by section 32 the legislature merely meant to say that the aldermen *shall* require a company to keep in repair *at least* so much of the surface material of the street as is in said section prescribed, but, on the other hand, *may* require the company to keep in repair as much more of the street as the

aldermen see fit? Would such an interpretation as this be in harmony with the spirit of the principle "that such a sense is to be made upon the *whole* statute that no clause, sentence, or word shall prove superfluous, void, or insignificant if by any other construction they may all be made useful and pertinent"?

Opinion of the Justices, 22 Pick. 571 at p. 573.
Commonwealth v. *McCaughey*, 9 Gray, 296.

If the power to impose restrictions contained in section 21 authorizes the imposition of duties such as that claimed in the cases at bar, it becomes an act, to be construed by the rule that every charge upon the subject must be created by clear, unambiguous words, and is not to be extended by a doubtful interpretation.

Sewall v. *Jones*, 9 Pick. 412–414.
Green v. *Holway*, 101 Mass. 245–248.

Full effect can be given to the language of section 32 of chapter 113 without in any way destroying the force or effect of the language in section 21, authorizing the aldermen to impose "such restrictions as they deem the interests of the public may require," as was pointed out in the opinion of the Attorney-general already cited. Such restrictions enable the aldermen to prescribe where in the street the railway shall be laid, the number of tracks, the location of turnouts, the method of construction, including the kind of rails, kind and number of sleepers, limitations upon the number of cars and rate of speed to be run, and many other details, the wise determination of which is most important to the interests of the whole public, in the use both of the railway itself and of the highway in which it is located. This interpretation gives full effect to both sections of the statute, and is, moreover, consistent with the principle that powers delegated to subordinate local authorities are strictly construed, and any

reasonable doubts as to the existence of a particular power resolved against the same. In addition to the Massachusetts and United States cases already cited, see: —

Endlich on the Interpretation of Statutes, sect. 352.
Vinal v. *Dorchester*, 7 Gray, 421 at p. 422.
Paine v. *Spatley*, 5 Kan. 525.

If the defendant is right in claiming that the requirement which the Board of Aldermen sought to impose was in effect the imposition of an indirect tax, or of an obligation in the nature of a tax, upon the street railway, it follows that the denial of the right to impose that requirement is more consistent than would be upholding the requirement, with the rule that statutes delegating to municipal authorities and other inferior authorities the power of imposing taxation must be in clear, unambiguous terms, and are subject to the rule of strict construction.

Endlich (*ubi supra*).
Bennett v. *Birmingham*, 31 Pa. St. 15.
Frankfort Railway v. *Philadelphia*, 58 Pa. St. 119.

In the case of *Cambridge* v. *Railroad Commissioners*, 153 Mass. 161, where the legislature provided that a certain avenue might be laid out, and that said avenue "may cross at grade any railroad operated by steam," and that the Railroad Commissioners should prescribe the details of the crossing, the Court held, contrary to the claim of the Railroad Commissioners, that the latter could not require the crossing to be made by an overhead bridge, but confined the details to be fixed by the Commissioners to such as had not been fixed by the legislature itself.

If, as was held in the case of *Commonwealth* v. *Smith*, an act authorizing railroad companies to issue bonds in a certain way was in effect a prohibition upon the issue of bonds in any other way and cut down the previous existing common law

right to issue bonds in any and every way; and if, as in the case last cited, under an authorization to a city to lay out an avenue at grade over a railroad, the details of which crossing were to be determined by a public board under delegated authority from the legislature, that board could not require the avenue to be carried over the railroad, is it reasonable to maintain that in the present case, where the legislature has specifically provided that the street railway company shall *keep in repair the surface material* of a certain portion of the street, and that portion a smaller portion than the legislature had formerly prescribed, a board of aldermen is at liberty to extend and increase the legislative requirements to any extent it sees fit for the sole benefit of a particular municipality?

If such a power does reside in the board of aldermen, then, as the board represents not the City of Worcester, but the public generally, it must follow that a requirement in a grant of location for the pavement of a street, or the rendering of any other duty, for the benefit of any other municipality than the City of Worcester, would be equally binding, since as was said in the case of *Cambridge* v. *Cambridge Railroad Company*, 10 Allen, at p. 56:—

> "The City of Cambridge has no right or interest in the road or its management, other than or different from that which belongs to any other municipal corporation in the Commonwealth, except that which may exist or accrue by reason of the provisions contained in section 7 of the original charter of the corporation, Statutes 1853, chapter 383, by which the right is granted to the cities of Boston and Cambridge of purchasing the franchise and property of the corporation on certain prescribed terms," etc.

IV.

The requirement relative to paving and its maintenance, being in excess of the power of the aldermen, was simply void.

Even a contract made by a town in excess of its corporate powers is invalid.

> "That a contract made by a town or its agents in excess of its corporate powers is invalid is settled by many cases."
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> *Swift* v. *Falmouth*, 167 Mass. 115 at p. 121, citing
> *Stetson* v. *Kempton*, 13 Mass. 272.
> *Anthony* v. *Adams*, 1 Met. 284.
> *Minot* v. *West Roxbury*, 112 Mass. 1.
> *Greenough* v. *Wakefield*, 127 Mass. 275.
> *Mead* v. *Acton*, 139 Mass. 341 at p. 344.
> *Spaulding* v. *Peabody*, 153 Mass. 129.
>
> See also
>
> *Dill* v. *Wareham*, 7 Met. 438.

The Worcester Consolidated Street Railway Company, the defendant in error, is not estopped to set out any of the true facts of these cases, or any of the principles of law applicable thereto, because all the elements of an estoppel are lacking. The Street Railway Company cannot be shown ever to have done any act *in pais*, or to have made any representation which the City of Worcester has believed or acted on to its prejudice, in such wise as to preclude the Company to assert the real facts and the principles of law applicable thereto.

The same rule applies to restrictions or provisions imposed illegally or in excess of authority by boards acting in a public character in this Commonwealth.

> In *Parsons* v. *Northampton* the plaintiff sought to enjoin the payment by the defendant of any part of the expense of abolishing the South Street grade-crossing, and one of the grounds on which it was contended that the payment should not be allowed was "because public school property

has been taken by the proceedings" of the county commissioners. In the opinion, Mr. Justice Barker, referring to this ground, observed that "the taking of a portion of a school-house lot for one of the approaches, even if void for want of authority in the commissioners, would not make their whole decree illegal, or the expenditure of money for carrying their order into effect void, so far as it was authorized by law."

Parsons v. *Northampton*, 154 Mass. 410 at p. 413.

The principle stated in the last case cited, that a provision void for want of authority would not make the whole decree illegal, is particularly applicable to the situation of boards of aldermen and selectmen under sections 7 and 21 of chapter 113 of the Pnblic Statutes, and springs naturally and logically from the capacity in which they act, the nature of the principal question submitted to their determination, and the object that the legislature had in view in conferring the power to impose reasonable restrictions.

As has already been pointed out, the aldermen act for the whole public and in no sense for the city; and as appears from cases cited in an earlier part of this argument, and still more conclusively from those cited in the second part of the argument, the result of their action does not create a contract. No part of their order, therefore, constitutes a consideration.

The charter of a street railway company is not granted for the profit of the donees, but for the furtherance of a public benefit, the inducement moving the legislature being to secure for the public a more full and beneficial use of the highways.

Commonwealth v. *Temple*, 14 Gray, 69 at p. 76.

The only contractual element involved is an implied agreement that the donees shall not be deprived of an opportunity to receive a reasonable return upon the investment of their private capital to promote the public service desired.

Commonwealth v. *Temple*, ubi supra.

The legislature itself in granting the charter has determined primarily the fundamental question that a railway in the general location described in the charter will be for the public benefit. The subordinate determination of the exact location of the railway in particular streets and highways within the territorial limits of particular cities and towns has been delegated to boards of aldermen and selectmen, respectively. As regards these boards, the fundamental question for *their* determination is: Do public necessity and convenience require to any extent, and, if so, to what extent, the location of a railway in the streets designated in the petition? After determining this question, they are to determine further under what restrictions the privilege of performing the public service contemplated by the charter shall be exercised in such streets. These restrictions, so far as they are valid and lawful, are binding upon the company if the location is accepted and the railway built upon it; but they are binding not by reason of any contract, but because, and so far as, they are lawfully imposed under authority of the legislature. If an unlawful restriction is included among them, that restriction is of no effect, because, being unlawful, it is foreign to the purpose for which the company was chartered, and foreign to the objects to be accomplished by the construction and operation of the railway. This appears from the language of section 63 of chapter 113 of the Public Statutes, authorizing this Court "to compel the observance of all laws governing street railway companies, and of all orders, rules, and regulations *made in accordance with this chapter* by the board of aldermen of a city or the selectmen of a town, or the Board of Railroad Commissioners." An order, therefore, not in accordance with the chapter would not be enforceable.

The acceptance of the location required by the statute is not in the nature of an agreement to perform and observe the restrictions. No agreement is necessary from the subject to compel compliance with the laws of the sovereignty. Every

law lawfully passed is binding upon all persons embraced within its limits quite irrespective of whether they like it or not, and whether they agree to submit to its provisions or not: so of every restriction lawfully imposed by the board of aldermen upon a street railway company. The restrictions annexed to the grant of location stand no differently as regards their effect upon the street railway company than any other order or regulation of the board of aldermen made under authority of any of the other sections of chapter 113 of the Public Statutes. No acceptance of such orders or regulations is necessary, or could add anything, to their efficacy. The acceptance required by section 7 and by section 21 of the location is to furnish evidence of the physical location of the company's railway, as until the location has been accepted there is nothing on record to show that the company intends to build its railway, or where it intends to build it. The route fixed by the board of aldermen may not be satisfactory. If it is not, the legislature desires evidence of the fact, and this evidence is supplied by the acceptance, or failure to accept, by the company within the thirty days fixed by the statute. The language of the statute itself is significant of this intention: "The location thus granted shall be deemed and taken to be the *true location of the tracks of the railway* if acceptance is filed," etc.; that is, the statute itself makes the order and the acceptance together constitute merely a designation of the physical position of the tracks. The words "tracks" and "railway" both refer to a physical, tangible thing to be placed in the streets, and in no sense to an agreement or anything in the nature of an agreement. All that follows from the action of the aldermen and the acceptance of the directors is the fixing of the true location *of the tracks*, and not at all any legal conclusions such as follow the acceptance of a statute which contains a provision that it shall not be binding until accepted. In the latter cases certain provisions expressed in language are fixed by the acceptance.

Suppose that the Company, in its acceptance of the locations, had added a statement that it accepted the same "subject to all the restrictions and conditions thereto annexed, so far as the same were lawful, and so far as the mayor and alderman had authority to impose the same as obligations upon the Company." No one can doubt that the Company would have had a right to add this statement, or that, having added it, the acceptance would still be good and the Company entitled to use the location; nor would the mayor and aldermen have been thereby in any way prejudiced. Having made their determination that the grant of the location was required by public necessity and convenience, and having specified the restrictions which they deemed the public interests required, their jurisdiction was at an end. They could not have recalled their grant because of the modified form of acceptance. The acceptance of the location actually filed by the Street Railway Company in the case at bar has no other effect than it would have had with the addition of the statement suggested above.

THIRD.

Assuming that the Board of Alderman acted, in imposing the so-called conditions, as the representatives of the City of Worcester, and that they were authorized to impose the conditions in form and manner as they attempted to do, nevertheless they represented said city in its corporate capacity as a mere governmental agency, and not in its private corporate capacity, so that, if said city became the obligee in any contract to which the Street Railway Company was obligor, the rights of said city under said contract were held not as its private property, but in trust as a governmental agency for the public in general, and were, therefore, subject at all times to the control of the legislature.

Cities have almost no private property.

South Dakota v. *North Carolina*, 192 U. S. 286 at p. 318.

There is no kind of property more clearly stamped with a public trust, the control of which for any purpose is vested in municipalities or their officers, than the public highways, and all duties touching their control.

The legislature of the State represents the public at large, and has full and paramount authority over the public ways and public places. Such ways

"are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities."

Dillon on Municipal Corporations, 4th edition, sect. 656, vol. 2.

"Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of the right of eminent domain and the damages paid out of the corporation treasury.

"The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature, from charter or statute."

Dillon on Municipal Corporations, 4th edition, sect. 683, vol. 2.

Brimmer v. *Boston*, 102 Mass. 19.

"The counties, towns, and cities into which the Commonwealth is divided are strictly public corporations, established for the convenient administration of government. Their municipal powers and duties are not created and regulated by contract, express or implied, but by acts passed by the legislature from time to time, according to its judgment of what the interests of the public require; and they have not the same rights to judicial trial and determination, in regard to the obligations imposed upon them, as other corporations and individuals have."

Inhabitants of Agawam, et al. v. *County of Hampden*, 130 Mass. 528 at p. 530.

Citing *Freeland* v. *Hastings*, 10 Allen, 570, 579, 580.
Rawson v. *Spencer*, 113 Mass. 40, 45.
Stone v. *Charlestown*, 114 Mass. 214, 223, 224.
Coolidge v. *Brookline*, 114 Mass. 592, 596, 597.
Hill v. *Boston*, 122 Mass. 344, 349, 355–357.
Laramie v. *Albany*, 92 U. S. 307.
Tippecanoe Commissioners v. *Lucas*, 93 U. S. 108, 114.
New Orleans v. *Clark*, 95 U. S. 644, 654.

See further to this point,

Meriwether v. *Garrett*, 102 U. S. 472. (1880.)
Prince v. *Crocker*, 166 Mass. 347.
Browne v. *Turner*, 176 Mass. 9.

The burden of proof is strongly upon the party asserting such private ownership by a municipality.

Proprietors of Mt. Hope Cemetery v. *Boston*, 158 Mass. 509 (1893),

as cited and distinguished in

Browne v. *Turner*, 176 Mass. 9, at p. 13.

FOURTH.

Whatever may have been the state of the law at the time the extensions of location involved in these suits were granted, the legislature, by enacting chapter 578 of the Acts of 1898, relieved this defendant from obligation to keep in repair any part of the surface material of the streets included in any of said extended locations.

Although the defendant in error does not believe that it is open to the plaintiff in error in these proceedings before this Court to argue that the Supreme Judicial Court of Massachusetts erred in its interpretation of this Statute, as the plaintiff would by such argument argue itself out of court and leave the case without any Federal question upon which to establish the right of the plaintiff to appear before this Court,

nevertheless, as its interpretation has been assigned as one of the errors of the State Court, the defendant in error submits the following argument in confirmation of the judgment of said Supreme Court on this question : —

The petitions for mandamus and the two bills in equity refer to the same two locations, both of which were granted as extensions of locations under section 21 of chapter 113 of the Public Statutes.

See reservation of the Chief Justice of the mandamus cases for consideration of the full Court.

All the locations referred to in the plaintiff's declaration in the action at law brought to recover from the defendant money alleged to have been expended by the City of Worcester in doing work which, it is alleged, the defendant should have done, were granted, according to the allegations of the declaration itself, under section 21 of chapter 113 of the Public Statutes.

Legislative History of Chapter 578 of the Acts of 1898.

What the law was prior to the enactment of this statute has already been considered in another part of this brief. It is now proposed to examine the broad general principles upon which this statute was drawn, and then to examine in detail certain clauses and certain other principles of law by which the plaintiff in error may claim, and claimed in the court below, have rendered inoperative the general purpose which the framers of the statute had in mind. As in the course of the examination it will be necessary to make frequent references to legislative documents and proceedings, the attention of the Court is now called to the following decision sustaining the propriety of such references : —

" C. ALLEN, J. In construing an act of Congress, the title of the act, the objects to be accomplished, the other provisions found in connection with those under especial consideration, the provisions and arrangement of the statutes which were amended, *the mode in which the embarras-*

sing words were introduced, as shown by the journals and records, the history of the times, *and especially of prior legislation upon the same general subject,* may all be considered."

Simpson v. *Story,* 145 Mass. 497 at p. 498,

and the cases therein cited:—

See also *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 464.
Binns v. *United States,* 194 U. S. 486, 495.

In his inaugural message of January 7, 1897, the late Governor Wolcott called the attention of the legislature to the subject of street railways and their relations to cities and towns in the following language:—

"The essential difference between street railway companies and railroad corporations lies in the fact that the former have the right to use, in common with other citizens, the public highways, whereas the latter have the exclusive use of their road-beds. In comtemplation of law this right to use the public way is granted such companies on the sole ground that it is for the 'interest of the public' that they be allowed so to do; this phrase recurring repeatedly in the statutes authorizing boards of aldermen in cities and the selectmen of towns to grant, refuse, extend, and revoke locations. In theory, therefore, the granting of a location is an accommodation to the public, and not a privilege or gift to the railway company; the franchise being granted solely for the convenience of all the citizens, as a method of affording cheap and convenient transportation over public ways. Upon this theory, if it is found that the right of thus using the streets is profitable beyond a moderate return upon the capital actually invested, it is just to require that the fares be reduced or the service improved. If this remedy were proved in practice to be easy of application, it would afford the best solution of this vexed problem; but this has not been found to be the case, and, in consequence, contrary to the theory of our existing law, these grants have often proved of great pecuniary

value to the companies receiving them. This has led to a general demand that a direct return shall be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets, or by a percentage of receipts or profits. This can be justified only upon a different theory; namely, that a valuable right is granted to the company, and therefore is taken away from the public. If such a direct return is exacted, it seems just, on the other hand, that the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility, or the lure of a higher bid from would-be competitors. It is possible that in some municipalities one of these conflicting theories might be more acceptable, whereas in others the public convenience might be better served by adoption of the other. Under existing legislation there is no authority to impose any tax whatever. I recommend that this authority be granted."

The legislature of that year passed an act entitled "An Act to provide for the appointment of a committee to investigate the subject of the relations between street railway and municipal corporations," the second and fourth sections of which set forth the duties of the proposed committee, as follows: —

"SECT. 2. The said committee shall forthwith proceed to investigate and consider the relations existing between cities and towns and street railway companies, the taxation of street railways and their franchises in this Commonwealth, and in other states and countries, and shall consider what legislation, if any, is needed to establish a more fixed tenure of franchises of street railways, and an *equitable* method of taxation thereof in this Commonwealth."

Acts of 1897, chap. 509.

The Governor appointed as members of this committee the Hon. Chas. Francis Adams, Hon. Wm. W. Crapo, and Hon. Elihu B. Hayes, all of whom duly qualified on July 20. This committee made a printed report to the legislature of

1898, and accompanied its report with drafts of two bills, only the first of which has any bearing upon the question now before the Court. This report with its accompanying bills may be found among the legislative documents of 1898, printed as House No. 475. This report was submitted to the legislature February 2, 1898, and referred to the Committee on Street Railways.

House Journal, p. 163.

The title of the bill annexed to the Governor's committee's report was "*An Act relative to street railways.*" On May 20, 1898, the committee on street railways reported a bill, printed as House No. 1352, based upon the Governor's committee's report, and entitled "*An Act relative to street railways.*"

House Journal, p. 1024.

The latter bill after due consideration by both branches of the legislature and with various amendments was finally enacted as chapter 578 of the Acts of the year 1898 under the same title, viz.: "*An Act relative to street railways.*"

The bill of the Governor's committee and the enacted statute will be found upon comparison to correspond so closely as to leave no reasonable doubt that the statute was based upon the bill, and that the statute adopted substantially all the provisions contained in the bill, although the 23 sections of the bill will be found expanded into 28 sections in the statute, the new matter in the statute being indicated in the following synopsis of the relation of the sections of the bill and statute: —

Sections numbered one to seven in both the bill and the statute refer to the same subject-matter.

Section eight of the statute is not found in the Governor's committee's bill, and will be considered in connection with the subject of the excise tax.

Sections nine to thirteen of the statute correspond with sections eight to twelve of the bill.

Section fourteen of the statute introduces a subject not touched upon in the bill; to wit, the authorization to the Railroad Commissioners to grant locations in certain cases where such grants have been refused by the local authorities.

Sections fifteen to twenty-three of the statute correspond in their respective subject-matter to sections thirteen to twenty-one of the Governor's committee's bill.

Section twenty-four of the statute relates to locations in State highways, which was not considered in the Governor's committee's bill.

Section twenty-five of the statute confers jurisdiction upon the Supreme Judical and Superior Courts to enforce the provisions of the statute, and to review the proceedings of State Boards in matters affecting street railways.

Section twenty-six of the statute corresponds to section twenty-two of the bill.

Section twenty-seven of the statute makes certain verbal amendments in section 8 of chapter 113 of Public Statutes.

Section twenty-eight of the statute, corresponding to section twenty-three of the bill, as to the date when the act shall take effect, also embodies considerable new matter relative to the Boston Elevated Railway Company, made necessary by the legislature's omission of that company from the operation of the provisions of the statute during the period of twenty-five years from the date of that company's charter.

Subject-matter of the Governor's Committee's Bill.

Section 1 of the committee's bill contained merely definitions of various words and phrases used in the bill. The committee's bill in its other sections embodied the following principles: —

1. In sections 2, 4, and 5 of the bill, provision was made

for the distribution of the corporation or franchise tax paid by street railway companies, under chapter 13 of Public Statutes, among the cities and towns in which they respectively operated their railways instead of among the cities and towns in which their stockholders resided.

2. Section 3 imposed an additional tax upon street railway companies equal to the excess paid in dividends in certain cases over 8 per cent. In speaking of this tax, the committee said in its report (p. 38): —

> "Aside from the matter of distribution, there seems to the committee no sufficient reason to suggest any *additional* taxation of street railways except in the following particular:"

and then follows in the report an explanation of the tax which has just been mentioned in this brief.

3. "Sections 6 to 11, inclusive," as explained in the committee's own language in a note to these sections,

> "relate to the same subject. The considerations on which they are based are discussed in the report, pages 26–28. Certain burdens in the way of street paving, clearing of ice and snow, etc., now imposed on the street railway companies in labor, etc., are commuted into their fair equivalent in money payments. The sections are designed to restore to the cities and towns complete control of their streets and responsibility for their condition, while providing for money payments from the companies equal to the cost of the work in connection with streets done by them under all provisions of law now in force."

4. Sections 12, 13, 14, and 15 relate respectively to the granting, extending, altering, and revoking of locations.

5. Section 16 relates to limiting the use of free transportation and of free passes, and imposes an ingenious penalty for its violation.

6. Sections 17, 18, 19, and 20 provided for assessing street railway companies in certain instances for a part of the expense of widening streets.

7. Section 21 related to the regulation of fares by the Railroad Commissioners, materially changing the provision then existing in section 44, chapter 113 of the Public Statutes.

8. Sections 22 and 23 covered the repeal of certain statutes and sections of the Public Statutes which the enactment of the bill would render unnecessary or inconsistent with its provisions, and fixed the date when the bill should take effect if enacted.

The Commutation Tax Scheme of the Governor's Committee.

The Governor's committee in its report discussed, criticised, and condemned the divided control of, and responsibility for, the streets resulting from the provision of law contained in section 32 of chapter 113 of the Public Statutes. The committee laid down in its report and embodied in its proposed legislation two propositions, viz.: "First, that it is the business of the city or town to keep its streets properly clear of obstructions; and, secondly, that under the circumstances the street railway companies should in this specific instance compensate them for so doing." The bill accordingly provided for the assessment of a new tax upon street railway companies graduated in proportion to their gross earnings per mile of track operated; for the distribution of this tax, as well as of the franchise tax, among the municipalities in which the railway was situated in proportion to the miles of railway in each municipality; for the application by cities and towns of all amounts received from their tax to the construction, repair, and maintenance of public ways within their respective limits; and for the relief of the street railway companies from any further liability for the maintenance and repair of the highways.

The committee thus summarized these provisions in its report: —

> "They establish the legal obligations of the parties, restoring to the municipalities, in so far as may be, the full

control of their public ways, and making them solely responsible for the condition of those ways, both as respects pavement and freedom from obstruction; and, on the other hand, so far as the street railway companies are concerned, the present obligations for labor or pavement work are commuted into fixed money payments, in the nature of a tax."

See report, House No. 475, pp. 26–28.

See note of the committee appended to section 6 of the committee's proposed bill.

See also appendix "H" at page 275 of said report, House No. 475, showing how the proposed commutation tax would fall upon the different street railway companies, and also how the tax would be distributed among the various cities and towns, and especially see the following statement in the introductory note to said appendix "H":—

"These figures may be and probably are rather in excess of the actual charges of this nature; but they were taken in order to compensate liberally the cities and towns for any exceptional expenses either in the nature of pavements or removal of snow, as these items, especially the latter, cannot be definitely fixed for any particular year."

Legislative Documents 1898, House No. 475, p. 275.

Did the legislature in its enactment of chapter 578 of the Acts of 1898 adopt the plan contained in the bill submitted by the Governor's committee as explained in the committee's report?

It is the defendant's contention that this question must be answered in the affirmative, and that the plaintiff's claim against the defendant cannot be maintained in any of the forms in which it has been made the basis for legal proceedings in the various cases at bar, unless the language of the statute is so different from that of the committee's bill as to lead the Court to answer in the negative the question just stated.

I.

There is a substantial correspondence between the language of the statute and that of the committee's suggested bill.

Consideration of this proposition, that the language of the statute indicates the approval and adoption by the legislature of the plan and purpose laid down by the Governor's committee, may be facilitated by a comparison of the corresponding sections in the bill and in the act relating to the subject of the commutation tax, and to the correlative subject of the non-liability of street railway companies for the further care of any portion of the highways. There therefore here follows a copy of sections 6, 7, 9, 10, 11, and 12 of the statute. So much of the language of each section as is taken from the corresponding sections of the committee's bill is printed in ordinary Roman type. So much of the language of the statute as is not contained in the bill is printed in italics; and such portions of the bill as are not included in the statute are printed in heavy type. Finally, such words and clauses of the statute as were adopted by way of amendments in the passage of the bill through the legislature after the same had been reported to the legislature by the legislative committee on street railways are, where such amendments seemed of material importance, indicated by heavy-faced italics if the amendment was by way of an addition to the reported bill.

"SECT. 6. Every street railway company shall on or before the fifteenth day of October in each year make and file in the office of the board of assessors of every city and town in which any portion of the railway operated by it is situated a return signed and sworn to by its president and treasurer, stating the length of track operated by it *in public ways* in such city or town, and also the total length of tracks operated by it *in public ways*, determined as provided in section 2 of this Act, and also the amount of its gross receipts during the year ending *on* the thirtieth day

of September next preceding, which gross receipts shall include all amounts received by it from the operation of its railway, but shall not include income derived from *sale of power, rental of tracks or* other sources.

"SECT. 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein *an excise* tax of an amount equal to such proportion of the following percentages of the gross receipts of such company as the length of tracks operated by it in *public ways of* such city or town bears to the total length of tracks operated by it *in public ways*, to wit: —

"In case of companies whose annual gross receipts per mile of track operated *are four thousand dollars or less one per cent. of the total annual gross receipts;* in case of companies whose annual gross receipts per mile of track operated are *more than four thousand dollars and less than* seven thousand dollars **or less** two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The *excise* tax provided by this section shall be in addition to the taxes now provided by law.

"SECT. 9. 8. Prior to the fifteenth day of November in each year the assessors of every city and town shall notify the collector of taxes in such city or town of the amount of **the** *excise* tax assessed therein on every street railway company under the provisions of section seven of this act,

and the collector shall forthwith notify the treasurer of every such street railway of the amount of the *excise* tax so assessed on it. Said *excise* tax shall become due and payable to such city or town within thirty days from the receipt by such company of *the* notice of the amount of said *excise* tax.

"All the provisions of law relating to the collection of taxes on property taxed locally, so far as the same are applicable, shall apply to the *excise* tax assessed under said section seven.

"SECT. *10.* 9. All amounts paid to cities and towns under the provisions of sections five and eight *nine and twenty-eight* of this act shall be treated by such cities and towns as a separate fund and shall be applied *towards* the construction, repair, and maintenance of the public ways, *and removal of snow therefrom*, within such cities and towns.

"SECT. *11.* 10. Street railway companies shall not be required to keep any portion of the surface material of streets, roads, and bridges in repair, but ***they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road, or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen, or selectmen, in any city or town where such are required, issuing the necessary permits therefor.*** Whenever, *during* the same is disturbed by reason of the original construction or subsequent alteration or extension, *or the making of any such repairs or renewals*, of any railway or by reason of any repairs or renewals of any railway or any part thereof, *said surface material is disturbed*, the company owning or operating such railway shall, at its own cost, *except as otherwise provided in this act*, renew and replace *to the reasonable satisfaction of the superintendent of streets, or other officer exercising like authority*, said surface material with the same form of construction or with such other form as the superintendent of streets, or other officer exercising

like power shall approve *as that disturbed, or, by first obtaining the approval thereof by such officer, with a different material and form of construction,* and shall restore the same *said street, road, or bridge* to as good condition as the same was *existed* at the time of such disturbance. Every street railway company shall be liable for any loss or injury that *suffered by* any person may sustain by reason of the carelessness, neglect, or misconduct of its agents or servants in ***the management and use of its tracks and,*** *during* the construction, alteration, extension, repair, or renewal of its railway, or in the renewal or *while* replacing of the surface of the *any* streets disturbed as aforesaid, *and resulting from the carelessness, neglect, or misconduct of its agents or servants engaged in the prosecution of such work, provided that notice of such loss or injury is given to the company and an action therefor commenced in the manner provided by section nineteen of chapter fifty-two of the Public Statutes and acts in amendment thereof.* ***Nothing in this section shall be construed to affect, enlarge, or diminish the rights, duties, or liabilities of any street railway corporation for or concerning the construction or maintenance of any bridge or bridges, or parts thereof, which any private person or corporation is now bound or legally liable, or may hereafter become bound or legally liable, in whole or in part, to construct or maintain.***

"SECT. *12.* 11. Street railway companies *shall* may clear snow from their tracks in such a manner as may be approved by the superintendent of streets, or by any other officer exercising like powers and shall, under the direction of such superintendent or officer, level the snow thrown upon the streets by them so as to make the highways safe for public travel; but they shall not be required to remove from the streets snow displaced in clearing their tracks as aforesaid *in the city or town in which such tracks are situated.*"

From the foregoing comparative view of the bill and the statute it is very evident that the committee's draft was adopted substantially without amendments in sections 6, 7, 9, and 10

of the statute. Amendments which were not merely verbal in these sections were two in number, namely:—

(*a*) In section 7, to the five classes of companies, graduated according to their gross receipts per mile of track operated, provided for by the Governor's committee, the legislature added a sixth class by dividing the committee's first class of companies receiving less than $7,000 per mile into two classes; namely, those earning less than $4,000 and those earning between $4,000 and $7,000.

(*b*) In section 10 was added a provision that the amounts paid to cities and towns under the provisions of the statute shall be applied towards *the removal of snow from the public ways*, as well as towards the construction and maintenance of such ways.

In section 11 numerous changes are apparent, which may be indicated as follows:—

(*a*) The clause, "They shall remain subject to all legal obligations imposed in original grants of locations," inserted. This clause, as indicated by the heavy italics, was added as an amendment while the bill was upon its passage through the legislature.

(*b*) The remainder of the first sentence of the section conferred upon the companies the right to make repairs without being subject to payment of fees or other conditions precedent.

(*c*) Verbal changes in the second sentence; and also

The insertion of the words after the requirement to replace surface material at its own cost "except as otherwise provided in this act," evidently referring to section 16, where in case of alteration the expense is to "be borne by such party or parties, and in such proportions, as the board of aldermen or selectmen may determine," and also to section 20, which provides that in case of alteration or change in grade of a highway under the provisions of chapter 51 of the Public Statutes there shall be included, as a part of the expense, "the necessary cost of changing its railway to conform to such alteration or change of grade."

The omission of the words "renew and" before the word "replace," making it very clear by implication that no renewal of the surface material is to be required of the street railway company.

The insertion of the clause in connection with the replacing of the surface material "to the reasonable satisfaction of the superintendent of streets or other officer exercising like authority"; and by

The substitution of the clause in reference to restoring the surface of the street to its former condition, "by first obtaining the approval thereof by such officer, with a different material and form of construction," for the clause in the committee's bill "with such other form as the superintendent of streets or other officer exercising like powers shall approve," merely making the provision more clear that the choice as to restoring the original form of construction was in every case with the company and negative any inference which might have been drawn from the language of the bill that the superintendent of streets could require the company to replace the disturbed surface with a different form of construction from that there at the time of the disturbance.

(*d*) The addition of a provision making a company liable for injury occasioned in the management and use of its tracks. This clause, as indicated by the heavy italics, was added to the bill in its passage through the legislature.

(*e*) Verbal changes more clearly limiting the company's liability in connection with construction, etc., of its railway to injuries suffered during the time that the work was actually being performed and negativing any inference of such liability for an accident resulting after the completion of the work and alleged to be due to the manner in which the work may have been performed.

(*f*) The insertion of a provision making the provisions of section 19 of chapter 52 of the Public Statutes applicable to actions to enforce such liability.

(*g*) The insertion of the last clause of the section evidently intended to preserve all contract rights of private individuals and corporations. This provision, as indicated by the italics, was added in the passage of the bill through the legislature.

It not being possible to conveniently indicate portions of the bill reported by the legislative committee on street railways which were omitted or struck out in the legislature, attention is now called to the following instances of that kind where the same were not merely verbal:—

(*a*) In section 7 the rate of percentage of commutation tax reported by the legislative committee for companies earning $4,000 or less per mile was one-half of 1 per cent.; of those earning between $4,000 and $7,000, 1½ per cent.; and in the case of each subsequent class one-half of 1 per cent. *less* than that now appearing in the statute; that is, the legislative committee ***reduced*** the tax rate one-half of 1 per cent. in each case below that fixed by the Governor's committee, and the House by amendment ***restored*** the rates to those fixed by the Governor's committee.

House Journal, June 2, 1898, pp. 1106, 1109.

(*b*) In section 12 the word "shall" in the first line was substituted for the word "may," and the following words reported by the legislative committee as the latter part of said section 12 in place of the words recommended by the Governor's committee, which are printed in heavy type in the foregoing comparison, were stricken out, namely:—

> "And shall, in a reasonable manner, level the snow thus thrown upon the streets so as to make the highways as safe and convenient for travel as conditions will permit, and the city or town shall, when public safety and convenience require, remove such snow from the highways."

See section 12 of House No. 1352.
House Journal, May 26, 1898, p. 1080.
House Journal, May 27, 1898, p. 1087.

A very important change made by the legislative committee in the draft of the bill proposed by the Governor's committee was by the insertion of an entirely new section printed as section 8 in the statute, and which was adopted substantially without change by the legislature.

From the foregoing analysis of the amendments made either by the legislative committee or the legislature itself to the bill submitted by the Governor's committee it may be confidently asserted that no intention appears to reject the plan of commuting by a money payment the street burdens formerly imposed upon street railway companies, unless such intention can be predicated upon the insertion of the clause in section 11, that "they shall remain subject to all legal obligations imposed in original grants of locations," or possibly upon the omission of the latter part of section 12 relative to the removal of snow and ice.

Section relative to Snow and Ice.

As regards the latter amendment, and in fact the whole subject of removal of snow and ice, the question is not fairly raised in the present cases. It is not the defendant's intention, therefore, to discuss this section of the statute beyond calling to the Court's consideration the fact that the removal of snow from the tracks, particularly of an electric street railway, is very much more closely related to the operation of the railway and to the convenience and benefit of the company itself than is the other matter of keeping the ordinary surface of the highway in repair. As regards snow and ice, it is a physical impossibility to operate a railway without their removal as speedily as possible, while, as regards the maintenance of the surface of the streets in repair, the company derives no benefit therefrom, nor does it by the operation of its cars, since the use of horses was discontinued, impose any special burden upon the surface of the streets.

The electric car of to-day can be, and in many cases is, operated over a railway constructed for all practical purposes in the same way as that of a steam railroad corporation.

While for these reasons the legislature might, had it seen fit,

retain to a certain extent the statutory obligation relative to removing snow from the tracks without retaining the obligation relative to the maintenance of the streets themselves in repair, it is at best doubtful if the amendment under consideration was intended to have this effect; for no change was made in section 10 of the statute providing that the money received from commutation tax should, among other uses, *be applied to the expense of the removal of snow*, and so much of the old law, section 27, Public Statutes, chap. 113, as related to the removal of snow and ice was repealed, and the penalty imposed by section 28 to enforce compliance with municipal orders relative to the removal of snow was thereby rendered inoperative and inapplicable to section 12 of chapter 578, and finally in the exception of the Boston Elevated Railway Company in section 28 of the statute from the application of the statute during the period of twenty-five years is a specific provision that it shall not apply to snow in any street or highway in which the Elevated Railway operates any railway.

History of the Clause "They shall remain Subject to all Legal Obligations imposed in Original Grants of Locations."

Coming now to the amendment in section 11, the history of its introduction into the act seems to be as follows:—

A motion was made in the House when the question was pending on ordering the bill to a third reading, May 27, 1898, to amend by inserting after the word "repair" in line 3 of section 11 the words "except as otherwise provided in the original grant of location."

House Journal, 1898, p. 1086.

This amendment was adopted.

House Journal, 1898, p. 1087.

On June 2, when the bill was pending on the question of passing it to be engrossed, a motion was made to strike out from the amendment previously adopted the word "original."

House Journal, 1898, p. 1107.

This amendment was rejected.

House Journal, 1898, p. 1109.

When the bill reached the Senate, the amendment in question was, on June 16, 1898, further amended by inserting after the word "otherwise" the word "hereafter."

Senate, Journal, 1898, p. 971.

In the adoption of this amendment the House non-concurred.

Senate Journal, 1898, p. 1003.
House Journal, 1898, p. 1203.

A committee of conference was appointed.

House Journal, 1898, p. 1203.
Senate Journal, 1898, p. 1003.

This committee reported, recommending that the original amendment as amended in the Senate, to wit, "except as otherwise hereafter provided in the original grant of location," be stricken out, and that there be inserted in place thereof the words "but they shall remain subject to all legal obligations imposed in original grants of locations." At the same time the amendment which now appears as the last sentence of section 11 in the statute, and which had been added in the House and non-concurred in in the Senate, was recommended for adoption by the committee on conference, and both recommendations were adopted.

House Journal, 1898, p. 1207.
Senate Journal, 1898, p. 1004.

Amendments proposed to eliminate the Commutation Tax Scheme from the Legislation.

It is a significant fact that no amendment was offered in the House either to the bill reported by the legislative committee

or to the bill of the Governor's committee, House No. 475, which was at one stage moved as a substitute for the legislative committee's bill, to strike out those sections of either bill which embodied the principle of the commutation tax and the municipal responsibility for the maintenance of streets. It is yet more significant that in the Senate such an amendment was moved and rejected.

Senate Journal, June 15, 1898, p. 957.
Senate Document No. 302.
Senate Journal, June 16, 1898, p. 969.

> "The pending amendments moved by Mr. Chamberlain striking out sections 7, 8, 11, and 12, and in section 10 striking out the words 'and nine' in lines 2 and 3, and striking out all after the word 'ways' in line 5, were severally rejected."

These amendments, had they been adopted, would have excluded from the statute *the commutation tax and the provision making municipalities responsible for the condition of the streets.* They would have also removed the provision that the money received from the new method of distribution of the franchise tax should be devoted not only to highway purposes generally, but also to the "removal of snow therefrom."

Section 8 of Chapter 578 of the Acts of 1898 is practically Conclusive Evidence of the Legislative Intent.

Section 8 of the statute originated with the legislative committee on street railways, and will be found in House Document No. 1352, the bill which that committee reported to the legislature; and now appears in the Revised Laws, chapter 14, section 45 (said Revised Laws being a legislative codification made in 1902 of the existing General Statutes of the Commonwealth).

This section was not contained in the suggested bill of the

Governor's committee, as printed in House No. 475. It contains most important provisions, and amounts in itself almost to a legislative statement of the design of the statute. Briefly, it provides for a triennial determination by the Board of Railroad Commissioners upon the petition either of a city or town or of a street railway company of

> "the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act which by law it was not previously required to do, also the average annual payments made by said company to said town or city under and pursuant to said section during said three years,"

and, further, that, after such determination, the Board of Railroad Commissioners should revise and fix the excise

> "at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city *of the work done by it during the preceding three years under the provisions of this act*, and *which it was not by law previously required to do*, as determined as aforesaid."

If the Legislature by the amendment in section 11 intended, as must be the case if the present suits of the City of Worcester are maintainable, that no change was to be effected in the previously existing relations between municipalities and street railway companies, one is forced to the conclusion that the legislature itself, and through the Governor's committee, devoted over a year of time and much expense to the consideration and enactment of a statute which should, by the operation of its own provisions, so far as its most important principles, those of the commutation tax and the responsibility for the maintenance of highways are concerned, become void and of no effect at the end of three years from the date when it became a law.

This clearly must be true if the contention of the plaintiff

is correct, and those actions are sustained, since upon the petition of the street railway company the Board of Railroad Commissioners would be forced to find that the City of Worcester had incurred no cost under the provisions of the act for work which it was not previously required to do, and that therefore the company need no longer mal e any annual payments by virtue of the commutation excise tax.

While from the language of section 8, as it appears in chapter 578 of the Acts of 1898, it may not be perfectly clear that the rate of tax is to be increased or diminished in accordance with the cost of the work done by the city as ascertained by the board of railroad commissioners, this doubt has been removed in the revised laws recently enacted at the special session of the legislature.

See Revised Laws, chap. 14, sect. 45.

See also note of the Report of the Commissioners for consolidating the Public Statutes to section 46 of chapter 14 of their Report, said note being printed at page 224 of said Report.

While it is therefore reasonably evident that the legislature adopted in its entirety the commutation tax principle, and the principle that the municipalities should be solely responsible for the condition of highways within their respective limits, it is necessary that the meaning and effect of the clause injected into section 11 should, if possible, be interpreted, since no part of the statute is to be rejected as surplusage, if it can be reconciled with the remainder of the act. It would be idle to assert that the clause is one capable of a fully satisfactory, and certainly it is not capable of an easy, explanation, but it seems safe to lay down certain propositions regarding it.

1. The word "original" was evidently used advisedly, as a motion to strike it out from the amendment in its earlier form was rejected in the House, as already pointed out.

2. The retention of the word "original" shows that the clause did not apply to extensions of locations. The distinc-

tion between original locations and extensions of locations is clearly made in section 15 of the statute, where provision is made for granting "a location for the extension of the tracks," with a limitation that no conditions shall be thereto attached other than or in addition to "such as may have been imposed in *the original grant of location*." This phrase, "original grant of location," in section 15, is precisely the same, except that it is singular intead of plural, as that in section 11; namely, "original grants of locations." In both sections the phrase cannot reasonably be construed to mean anything different from "original location," as defined in section 1 of the Act. The same distinction will be found in the note of the Governor's committee, House No. 475, to section 13 of that committee's draft of the bill, said section 13 corresponding to section 15 of the statute.

3. The clause is not meant to apply only to the future, since the word "hereafter," introduced by the Senate into the first form of the amendment, making it read "except as otherwise hereafter provided in the original grant of location," was omitted by the conference committee from the clause in its present shape.

4. The word "legal" qualifying the word "obligations" must be given much weight, as this word was introduced into the clause in its present form by the conference committee. In the former clause adopted by the House there was no reference to legality other than as it might be read into the clause, the express language being simply "except as otherwise provided," etc.; and there is certainly a distinction between legislative recognition of legal obligations and such a recognition of all provisions unlimited and unrestricted by the qualification of legality, the distinction being that provisions illegal, so far as the power to impose then existed, might be validated through such recognition, while the use of the qualification would leave the provisions just where they stood before, of no effect unless legal, and of full effect if legal.

5. Had the legislature seen fit in this clause to add the word "other," its meaning would at once have become simple and in entire harmony with the rest of the statute, as there are many legal obligations properly imposed in grants of location which are not really incident to keeping in repair the surface material of streets, and yet which the legislature might, from an abundance of caution, and to avoid the possibility of litigation, wish

to indicate as being unaffected by this statute. The best example of such a restriction is perhaps that considered by the Court in *Newcomb* v. *Norfolk Western Street Railway Company*, 179 Mass. 449. Apparently and superficially, this restriction might have been claimed to be in effect, that the company should keep the surface of the street in repair by watering, but upon examination it becomes apparent that the requirement relates really to the operation of the railway, and in the words of the Court, "although affirmative in form, in substance restricts the defendant to running cars in such a way as not to raise a dust." Other examples of such restrictions might perhaps be the following:—

Maintenance of guard-rails on bridges and at curves.

Maintenance of guard-fences where a railway runs at the side of the street on or near the edge of an embankment.

Requirements to oil rails at curves and turnouts.

Restrictions as to use of sand and salt in winter.

And it may well be that the most reasonable meaning to be given to the clause is, as many persons believe, to preserve the effect of "other legal obligations" imposed in grants of original locations.

Under any interpretation of chapter 578 of the Acts of 1898 the defendant is relieved from compliance with the requirements upon which these actions are based.

Even if the requirements which the aldermen of Worcester sought to impose in the various orders set out and referred to in the petitions for mandamus, the bills in equity, and the action of contract constituted, contrary to the contention of the defendant, legal obligations within the meaning of that term as used in section 11 of chapter 578, Acts 1898, they are not kept in force by the clause in the first sentence of that section, "but they shall remain subject to all legal obligations imposed in original grants of locations"; for in every instance the order of location set out in the various cases was an order for *an extension of location* granted under section 21 of chapter 113 of the Public Statutes.

Unless, therefore, the orders of location constitute contracts

which as against the City of Worcester the legislature was powerless to impair (a proposition elsewhere discussed), there is nothing in the Act of 1898 to keep the requirement in force. The only legal obligations preserved by that statute, if any, are those imposed in "original grants of locations." This phrase, "original grants of locations," is substantially defined in section 1 of the statute, as follows:—

> "In the construction of this act, unless such meaning would be repugnant to the context, . . . 'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain, and operate a street railway in a public highway or street in such city or town. An 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

The exact term there defined is "original location," but the word "location" itself is also therein defined; while in section 15 the distinction is clearly drawn by the legislature between a location for an extension and an "original grant of location," and, as has already been pointed out, this is exactly the same phrase as that used in section 11. That the word "original" is of significance in section 11 is shown by the fact already pointed out that a motion was made to strike out the word "original," and was defeated.

The statute clearly recognizes such a difference as regards the future, and specifically prohibits in section 15 the imposition of "any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage" of the statute, "or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage" of the statute. Under the provisions of this section no company at any time receiving an extension of location in any city or town in which its original location had been granted under the provisions of the statute

could have any additional burden imposed which had not in fact been imposed in such original location, and no company receiving an extension of location in any city or town in which any of its railway had been located prior to the passage of the statute could have imposed upon it any requirement except such as the general statutes themselves imposed upon all street railways at the date of the passage of the act.

The Supreme Court of Massachusetts has recognized the difference between extensions of locations and the original locations of street railways.

So. Bost. R.R. v. *Middlesex R.R.*, 121 Mass. 485.
Daniels v. *Commonwealth, etc., Co.*, 175 Mass. 518.
Springfield v. *Springfield, etc., Co.*, 182 Mass. 41.
Worcester v. *Worcester, etc., Co.*, 182 Mass. 49.

As "original grants of location" do not include *extensions of locations*, and as all the grants in the cases before the Court are grants of extensions of location, the defendant respectfully submits that the Supreme Court of Massachusetts was not in error in its interpretation of the purpose and effect of the statute of 1898, chapter 578.

The following table shows the distribution and location of the various provisions of the Statute of 1898, chapter 578, in the Revised Laws of Massachusetts, the latest re-enactment of the general laws in the Commonwealth of Massachusetts: —

Statutes, 1898.	*Revised Laws.*
chap. 578, sect. 1	chap. 111, sect. 1; 112, sect. 1
" 578, " 2	" 14, " 37
" 578, " 3	" 14, " 41
" 578, " 4, 5	" 14, " 61, 62
" 578, " 6, 10	" 14, " 43–47
" 578, " 11	" 112, " 44
" 578, " 12	" 112, " 41
" 578, " 13	" 112, " 7

Statutes, 1898.	*Revised Laws.*
chap. 578, sect. 14	chap. 112, sect. 11
" 578, " 15–17	" 112, " 30–32
" 578, " 18	" 112, " 71
" 578, " 19–21	" 112, " 33–35
" 578, " 22	" 112, " 21
" 578, " 23	R. 1901, 180
" 578, " 24	R. L. 112, sect. 61
" 578, " 25	" " 112, " 98, 100
" 578, " 26	" " 14, " 61
" 578, " 27	" " 112, " 8
" 578, " 28	" " 112, " 1

FIFTH.

Assuming the purpose and effect of the statute, chapter 578 of the Acts of 1898, to have been to abrogate the obligations (if they were such) set out in the five cases before this court, it is clear that the legislature of Massachusetts did not, in so abrogating the obligations, violate any provisions of the Constitution of the United States.

The only principles of constitutional law which the plaintiff in error in the suits before this Court may, under the assignments of error, claim to be violated by the provisions of the statute are two:—

(*a*) Article I., section 10, of the Constitution of the United States, which forbids a State to pass any law impairing the obligations of contracts.

(*b*) Fourteenth Amendment of the Constitution of the United States, forbidding a State to deprive any person of his property without due process of law.

As has been shown above, the orders of location in suit never constituted contracts between the street railway company as obligor and the City of Worcester as obligee, because

the Board of Aldermen, in issuing the orders of location, did not and could not act for the City of Worcester in so doing, but acted as public officers, entirely independently of the City of Worcester. Even assuming, therefore, that the obligations in question were validly imposed (which the defendant in error denies), they did not and could not constitute contracts between the city and the Street Railway Company, nor did the Street Railway Company, by reason of such obligations, owe any duty, contractual or otherwise, to the City of Worcester. If, then, the so-called conditions were not contracts between the City of Worcester and the Street Railway Company, the Act of 1898, in abrogating them, constituted no violation of the obligation of any contract of which the City of Worcester can complain; and, if the condition resulted in no enforceable property right in the City of Worcester, their abrogation could not amount to depriving the city of its property without due process of law.

And, even assuming both that the obligations in question were validly imposed, and that they constituted contracts enforceable by the city against the Street Railway Company, the legislature, in abrogating them, was guilty of no violation of said provisions of the Constitution of the United States.

As has been shown above, these obligations, if property at all of the City of Worcester, were held by the city not as its private municipal property, but were held by it in its capacity as a mere governmental agency, and were, therefore, at all times subject to the control of the legislature. The following cases illustrate this right of State control:—

In a leading case this Court upheld as constitutional an act of a State legislature, ordering a town to discontinue a ferry, the right to keep which the legislature had previously granted to the town, the purpose of the revocation being to prevent the ferry from competing with a near-by toll bridge maintained by a private corporation.

East Hartford v. *The Hartford Bridge Co.*, 10 Howard, 511.

In another case the plaintiff, a county, had incurred a large debt, and had used the money for improving the whole county. An act of the legislature divided the county into three parts, and left all the debts theretofore contracted as a legal obligation against the plaintiff. This act of the legislature was upheld as constitutional by this Court, although the plaintiff corporation, which remained subject to all the debts, contained only one-third of the wealth and taxable property of the original county.

Laramie County v. *Albany County*, 92 U. S. 307.

In another case this Court upheld an act of the legislature annulling a town and resolving it back into the State.

Meriwether v. *Garratt*, 102 U. S. 472.

In a late Massachusetts case the Boston Transit Commission had executed a lease of a subway tunnel to the West End Street Railway Company, and by a later act of the legislature, in the absence of objection on the part of the West End Street Railway Company, authorized a lease of the tunnel to another street railway company, the Boston Elevated Street Railway Company. Certain inhabitants of the City of Boston brought a bill in equity, seeking various relief, on the ground that said later statute deprived the City of Boston of its property without compensation or due process of law, and impaired the obligation of a contract between the City of Boston and the West End Street Railway Company. In denying that said later act was unconstitutional on either of the grounds alleged, Chief Justice Holmes, speaking for the Court, said:—

"We prefer, however, to put our decision on more substantial grounds. The railroad company does not object to the changes, as was the case in *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1. The city has no greater interest in the lease than it has in the tunnel. Its interest in the lease is as much public property and as subject to legislative control as its interest in the tunnel. No part of the proceeds go to its private uses (St. 1894, chap. 548,

sect. 38; *Mahoney* v. *Boston*, 171 Mass. 427, 430): and, if any part did go to such uses, it is hard to see how, as against itself, the city, by making a contract to let public property held by it subject to the control of the legislature, could cut down this control. The control is not subject to the chance of the city's contracting, but the contract is subject to the power of the legislature over the subject-matter. *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 339, 340. *New Orleans* v. *New Orleans Water-works Company*, 142 U. S. 79, 91, 92. *Chicago, Burlington & Quincy Railroad* v. *Nebraska*, 170 U. S. 57, 72. *Railroad Company* v. *Ellerman*, 105 U. S. 166. See *Brighton* v. *Wilkinson*, 2 Allen, 27. *Brimmer* v. *Boston*, 102 Mass. 19. *Agawam* v. *Hampden*, 130 Mass. 528, 530, 531, *et seq.*"

Browne v. *Turner*, 176 Mass. 9 at p. 14.

See also

People v. *Kerr*, 27 N. Y. 188.
Clinton v. *Cedar Rapids, etc., R. Co.*, 24 Iowa, 455.

Even if any property rights accrued to the City of Worcester by virtue of the provisions of the grant of location, such rights are under the statute interfered with by the legislature itself in the exercise of its paramount authority over the highways, and full compensation by due process of law is provided in the statute itself.

Section 8 of the statute, as it now appears in Revised Laws, chap. 14, sect. 45, provides the method and the tribunal to ascertain the annual cost to the city of work done by it under the provisions of the statute which it was not previously required by law to do; that is, it provides for determining the *value* of the property right, if such a right existed, and for full compensation through the provision for readjusting the rate of the excise tax. Said section is as follows:

"SECTION 45. The aldermen of a city, the selectmen of a town or a street railway company operating in such

city or town may petition the board of railroad commissioners for a revision of the amount of the excise tax to be paid by a company under the provisions of the preceding section. Said board shall, under such petition, after public notice and a hearing at which said aldermen or selectmen and said company may submit evidence, determine the average annual cost to said city or town of the work done by it during the preceding three years under the provisions of chapter one hundred and twelve which it was not by law required to do prior to the first day of October in the year eighteen hundred and ninety-eight, and also the average annual payments made by said company to said city or town under and pursuant to the provisions of the preceding section during said three years; and having determined said average annual cost and average annual payments, said board shall fix and determine the proportion of a percentage of the gross receipts which shall be paid as an excise tax under the provisions of said section by the company to said city or town annually thereafter, said percentage to be fixed at such a rate as will be necessary to yield to said city or town annually thereafter an amount equal to the average annual cost to said city or town determined as aforesaid; and the percentage so fixed shall not be again changed for the period of three years and only in the manner herein provided. Said board may at any time upon petition therefor by a city or town entitled to a part of the excise tax paid by a street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company, instead of the proportion based upon length of tracks as hereinbefore provided."

the Massachusetts Supreme

Section 25 of the statute vests both in ~~this~~ Court and in the Superior Court jurisdiction in equity to enforce the provisions of the statute, to review the rulings of law of any State board or commission relative to street railways, and

to annul, modify, and amend the same as law and justice may require. The act, therefore, contains ample provisions for securing to the city full compensation for any property or property rights to which it may be entitled.

Certain Cases Distinguished.

As the City of Worcester had no power to enter into contracts with the Street Railway Company respecting locations, unless such power can be shown to have been granted by the legislature or recognized by the decisions of the courts of the Commonwealth of Massachusetts, adjudications of the courts of other jurisdictions apparently holding that, under the circumstances of the cases there decided in which usually the street railway company was the moving party, there was a contract between a municipality and a street railway company, have little or no bearing on the question as to whether the obligations involved in these suits were contractual rights of the City of Worcester.

Many such cases, however, in other jurisdictions which may be cited as showing the existence of a contract without express legislative power to make the same, do not in fact so decide.

Cases of this sort may be divided into two classes : —

(1) Those cases where the municipality has been granted power by the legislature to enter into contracts with street railways respecting locations. Cases of this class are : —

N. Y. & N. H. Rd. v. *N. Y.*, 4 Blatchford, 193.
Indianola v. *Gulf, Western Texas & Pac. Ry.*, 56 Tex. 594.
City of Houston v. *Houston City St. Ry.*, 83 Tex. 548.

(2) Those cases where the street railway company is plaintiff insisting on some term in its grant of location, and prevails not because the location is a contract between the street railway company and the municipality, but because it

is at least an executed grant from the State to the street railway company. Cases of this class are: —

Des Moines City Ry. Co. v. *Des Moines*, 90 Iowa, 770.
Springfield Ry. Co. v. *Springfield*, 85 Mo. 674.
People v. *Obrien, Rec'r*, 111 N. Y. 1.
Wright v. *Milwaukee Electric Ry.*, 95 Wis. 29.
Arcata v. *Arcata & Mad River Ry.*, 92 Cal. 639.

Another class of cases may be cited by the plaintiff in error as upholding the right of municipalities in the jurisdictions where those cases were respectively decided to contract with a street railway company respecting locations without express power so to do, if the plaintiff in error can show that the municipalities in those cases did not, as a matter of fact, have such express power to contract, and that the locations were, as a fact, held in those cases to constitute contracts.

Cincinnati & Springfield Ry. v. *Carthage*, 36 Ohio, St. 631.
Pittsburgh & Birmingham Rd. v. *Birmingham*, 51 Pa. St. 41.
Detroit v. *Detroit Ry.*, 37 Mich. 558.
Hovelman v. *Kansas City Horse Ry.*, 79 Mo. 632.
Lansing v. *Lansing City Ry.*, 66 N. W. 949 (Mich.).
State v. *Corrigan Ry.*, 85 Mo. 263.
Kansas v. *Corrigan Ry.*, 86 Mo. 67.
Birmingham & Pratt Mines St. Ry. v. *Birmingham St. Ry. Co.*, 79 Ala. 465.
Belleville v. *Citizens' Horse Ry. Co.*, 152 Ill. 171.
Harvey v. *Aurora & Geneva Ry. Co.*, 186 Ill. 283.
Rutland Electric Light Co. v. *Marble City Electric Light Co.*, 65 Vt. 377.
Allegheny v. *Millville, Etna & Sharpsburg St. Ry.*, 159 Pa. St. 411.

That the mere fact that the language of an order of municipal authorities granting a location to a street railway company is apt to create a contract between the municipality and the street railway company does not result in such a contractual relation unless the municipality has power so to contract, is shown by two decisions of this Court. In *Georgia*

R.R. & Banking Co. v. *Smith*, 128 U.S. 174, this Court held that the provision in the charter of a railroad company that "the charge of transportation or conveyance shall not exceed five cents per mile for every passenger" did not constitute a contract with the railroad company that the rate of fares should never be reduced below five cents per mile. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U.S. 368, the question being on the words, in a grant of location to a street railway company, "the rate of fare for any distance shall not exceed five cents in any one car," this Court held that this language constituted a contract that the rates of fare should not be reduced below that amount, distinguishing at page 388 the case of *Georgia R.R. & Banking Co.* v. *Smith*, ubi supra, as follows: —

> "It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them."

SIXTH.

It is submitted that the question whether the statute under consideration violates any provision of the Massachusetts constitution is not open in these cases before this Court.

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Supreme Court of the United States.

Nos. 144, 145, 146, 147 and 148.—October Term, 1904.

Nos. 144 and 145. The City of Worcester, Plaintiff in Error, *vs.* The Worcester Consolidated Street Railway Company.	In error to the Supreme Judicial Court of the Commonwealth of Massachusetts.
Nos. 146 and 148. The City of Worcester and the Board of Aldermen of the City of Worcester, Plaintiffs in Error, *vs.* The Worcester Consolidated Street Railway Company.	In error to the Superior Court of the Commonwealth of Massachusetts.
No. 147. The City of Worcester, Plaintiff in Error, *vs.* The Worcester Consolidated Street Railway Company.	

[February 20, 1905.]

These five cases were brought here by writs of error, sued out by the City of Worcester, for the purpose of reviewing the several judgments of the Supreme and Superior Courts of the Commonwealth of Massachusetts, respectively, affirming the judgments of the trial courts in favor of the railroad company, the defendant in error. The five cases involve the same questions and were brought for the purpose of answering any possible objection to the particular mode adopted in any one case for the purpose of obtaining the relief sought by the plaintiff in error. (182 Mass. 49.) The first two cases were petitions for writs of mandamus against the railroad company, which petitions were demurred to, and the demurrers sustained. Of the three other cases, two were suits in equity, and were brought by the city against the railroad company, and were heard upon the bills and demurrers thereto, the court sustaining the demurrers; the fifth case was an action on contract originally brought by the city against the railroad company, in the Superior Court and heard upon demurrer to the complaint, which was sustained and judgment ordered for defendant, from which judgment plaintiff appealed to the Supreme Judicial Court of the Commonwealth.

The defendant in error is a street railroad corporation, organized and doing business under the laws of the State of Massachusetts, and it owned

and operated in the City of Worcester and in numerous outlying cities and towns a street railway system, parts of which had previously belonged to other similar corporations and had been acquired by the consolidated company in 1901, by the purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of the Commonwealth. Under the general laws of the Commonwealth, as they existed, from 1891 to 1893, it was provided that a street railway company might apply to the board of aldermen of a city, or the selectmen of a town, for the location of the tracks of the railway company in the streets of the city or town, and, after hearing, it was provided that the board might grant the petition "under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof." (Section 7 of chap. 113 of the Massachusetts Public Statutes.)

The law also provided (section 21 of above act) that the board of aldermen or the selectmen might, from time to time, "under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof."

Section 32 of the act made it the duty of every street railway company to keep in repair, to the satisfaction of the superintendent of streets, "the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads, (the company) shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks," &c.

As the law then stood, the railroad company, on several different occasions, between 1891 and 1893, made applications for and was granted the privilege of extending the location of its tracks. On the 11th day of May, 1891, the defendant in error, upon application, was duly granted an extension of its location for its tracks in certain streets in the City of Worcester, which extension of location was stated in the order or decree of the board of aldermen to be granted "upon the following conditions;" eight different conditions then follow, among which is—

"Second. That block paving shall be laid and 'maintained between the rails of its track and for a distance of eighteen inches outside of said rails for the entire distance covered by this location.'"

This order or decree was duly accepted in writing by the defendant in error, and its acceptance filed with the clerk of the City of Worcester. Other extensions of locations were applied for and granted during this time, some of which were upon the condition or restriction that the paving should be between the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office.

Subsequently, and in 1898, (chap. 578 of the Massachusetts Laws of that year,) provision was made for a somewhat different system of taxation than that which prevailed at the time these several extensions of locations were granted and accepted by the railroad company. In was provided by section 11 of that act as follows:

"SEC. 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge, in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor."

After the passage of this act of 1898 the railroad company consented and conformed to its requirements, and thereafter omitted to make the repairs in the streets which had been required of it at the time when its extended locations were granted during the period from 1891 to 1893. The city thereafter sought by these various actions or proceedings to compel the street railway company to repair and maintain the surface of the streets, as provided for by the law in force when the extended locations were given and accepted. During the time that the railroad company had since the passage of the act of 1898, omitted to make the repairs provided for as a condition for the granting of its application for extended locations, the city had incurred expenses in renewing and repairing various portions of the pavements, because of the omission and refusal of the railroad company to do so, and one of these actions was brought to recover the expenses thus incurred by the city in making such repairs and renewing such pavement.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The defendant in error makes no objection to the form in which the question to be decided comes before us. Whether one or the other action or proceeding is proper and appropriate need not, therefore, be considered.

The contention on the part of the plaintiff in error is that, by virtue of the restrictions or conditions placed by it upon granting the various exten-

sions of locations of the tracks of the railroad company, and by the acceptance of the same by the company, a contract was entered into between the city and the railroad company, which could not be altered without the consent of both parties, and that as the city had never consented to any alteration of the obligation of the railroad company to make the repairs in the streets as provided for in those restrictions or conditions, the subsequent legislation contained in the act of 1898 impaired the obligation of that contract, and was therefore void, as a violation of the Constitution of the United States.

In the view we take of this subject it may be assumed, for the purpose of argument, that the City of Worcester had power, under the legislation of the State, to grant the right to extend the location of the railroad company's tracks upon the restrictions or conditions already mentioned. It may also be assumed, but only for the purpose of the argument, that the restrictions or conditions contained in the orders or decrees of the board of aldermen, upon their acceptance by the company, became contracts between the city and the company.

The question then arising is, whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the Commonwealth had that power. A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State. (*East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534.)

As is stated in *United States* v. *Railroad Company*, (17 Wall. 322, 329,) a municipal corporation is not only a part of the State but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory, as it governs the State at large. It may enlarge or contract its powers, or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *New Orleans* v. *Clark*, (95 U. S. 644, 654,) it was stated by Mr. Justice Field, in delivering the opinion of the court, that—

"A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this, only in another way, when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

In *Commissioners of Laramie County* v. *Commissioners of Albany County et al.*, (92 U. S. 307,) it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the State, and that the charters under which such corporations are created may be changed, modified or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that "public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text writers upon the subject and the great weight of judicial authority."

In *Commissioners &c.* v. *Lucas, Treasurer*, (93 U. S. 108–114,) the question of the validity of an act of the legislature was presented, and Mr. Justice Field, in delivering the opinion of the court, said:

"Were the transaction one between the State and a private individual, the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the State, except for public purposes, and then only upon compensation or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. . . . But between the State and municipal corporations, such as cities, counties, and towns, the relation is different from that between the State and the individual. Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn at the pleasure of the legislature."

In *Mount Pleasant* v. *Beckwith*, (100 U. S. 514,) it was held that, where no constitutional restriction is imposed, the corporate existence and powers of counties, cities and towns are subject to the legislative control of the State creating them.

In *New Orleans* v. *New Orleans Water Works Company*, (142 U. S. 79,) it was also held that a municipal corporation was the mere agent of the State in its governmental character, and was in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation. It was also therein held that such a corporation, in respect of its private or proprietary rights and interests, might be entitled to constitutional protection. The Massachusetts courts take the same view of such a corporation. (*Browne* v. *Turner*, 176 Mass. 9.)

Enough cases have been cited to show the nature of a municipal corporation as stated by this court. In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature. This is asserted in *Commissioners &c.* v. *Lucas, Treasurer*, (93 U. S. 115,) and in *Mount Hope Cemetery* v. *Boston*, (158 Mass. 509,) the Supreme Court of Massachusetts held that cities might have a private ownership of property which could not be wholly controlled by the State government.

It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare. In *City of Springfield* v. *Springfield Street Railway*, (182 Mass. 41) this question was before the Supreme Judicial Court of Massachusetts, and the contention of the city, to the same effect as the plaintiff in error contends in this case, was overruled. It was therein held that the city acted in behalf of the public in regard to these extensions of

locations, and that the legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it. The case at bar was decided at the same time as the Springfield case, (182 Mass. 49,) and the proposition that the legislature had the power to free the company from obligations imposed upon it by the conditions in the grant of the extended locations was adhered to, and the Springfield case cited as authority for the same. We concur in that view.

There is no force in the contention that the City of Worcester has a proprietary right in the property of the defendant in error, reserved to it under the original statute incorporating the Worcester Horse Railroad Company. (Chap. 148, Mass. Laws of 1861.) These sections simply give the City of Worcester the right, during the continuance of the charter of the corporation and after the expiration of ten years from the opening of any part of said road for use, to purchase all its franchises, property, rights, etc. That right is not affected by the legislation in question, even assuming (which we do not for a moment intimate) that the act of 1898 affected the right of the city to make the purchase under the sections above cited.

We see no reason to doubt the validity of the act of 1898, and the judgments of the Supreme Judicial Court and the Superior Court of Massasetts are, respectively,

Affirmed.

True copy.

Test :

Clerk Supreme Court, U. S.